

*United States Court of Appeals
for the Second Circuit*



APPENDIX

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75-7294

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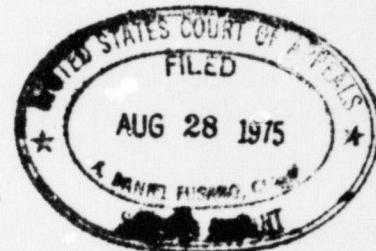
United States Court of Appeals
SECOND CIRCUIT

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff-Appellee,
against

IRENE SOLOMON and LOUIS SCHUSTER as Trustee of the
S & L Pension Trust-R.T.B. Industries, Inc.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



APPENDIX

RIVKIN, LEFF & SHERMAN
Attorneys for Defendants-Appellants
55 North Ocean Avenue
P.O. Box 669
Freeport, New York 11520

LE BOEUF, LAMB, LEIBY & MAC RAE
Attorneys for Plaintiff-Appellee
140 Broadway
New York, New York 10005

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Docket Entries.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

-against-

IRENE SOLOMON and LOUIS SCHUSTER
as Trustee of the S & L Pension Trust-
R.T.B. Industries, Inc.,

Defendants-Appellants.

DOCKET ENTRIES

7 10 1 1 1 NATIONAL LIFE INSURANCE CO. v . IRENE SOLOMON & AN

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
10-11-74	Complaint filed. Summons issued.	1 JSS
11-1-74	Clerk's order allowing personal service of summons and complaint filed.	2
11/13/74	Affidavit of Stuart Lesansky filed. re: service of sum & comp.	3
11/13/74	Affidavit of Stuart Lesansky filed. re: service of sum & comp.	4
11-19-74	Summons returned & filed. (see affidavits of service #s3&4)	5
11-27-74	Summons returned and filed/not executed.	6
12-23-74	First amended complaint filed.	7
2-5-75	Notice of Change of address filed.	8
2-18-75	Notice of Motion for summary judgment ret 3-5-75. for m. ord r	9
2-18-75	Memorandum of law in support of pltff's motion filed.	10
2-18-75	Statement pursuant to Rule 9 filed.	11
2-20-75	ANSWER filed.	12
2-20-75	Notice to admit filed.	13
2-20-75	Notice to produce filed.	14
2-20-75	First set of interrogatories filed.	15
3-1-75	Affidavit of Irene Solomon and memorandum of law in opposition to pltff's motion for summary judgment filed.	16/17
3-1-75	Defts' statement pursuant to rule 9(g) filed.	18
3/5/75	Before BRUCHHAUSEN, J.— Case called- Pltff's motion for summary judgment submitted-Decision reserved.	

Docket Entries.

3-14-75	Pltff's reply memorandum filed.	19
3-14-75	By BRUCHHAUSEN, J.-Stipulation dtd 3-14-75 extending time in which pltff is to plead with respect to the defts counter-claim etc is extended until 20 days after the entry of an order with respect to pltff's motion for summary judgment filed.	20
3-31-75	By BRUCHHAUSEN, J.-Order dtd 3-31-75 granting pltff's motion rescinding the insurance policy filed. Settle order on five (5) days notice. (p/c mailed to attys)	21
4-16-75	By BRUCHHAUSEN, J. - Order dtd 4-15-75 granting pltff's motion for summary judgment rescinding a policy of life insurance filed. (XXXXXXXXXXXXXX).	22
4-21-75	JUDGMENT dtd 4-16-75 that pltff's motion for summary judgment is granted & that the life insurance policy issued by pltff is rescinded, etc. filed. (p/c mailed to attys)	23
5/9/75	Notice of Appeal filed. Copy of Notice of Appeal and duplicate of docket entries filed.	24
5/19/75	Bill of Costs filed. Costs are taxed in the amount of \$47.92.	25
6-11-75	Supplemental affidavit in opposition to pltff's motion for summary judgment filed with Memorandum of Law.	26
6-11-75	Supplemental affidavit of Rowland Ricketts, Jr filed with Reply memorandum.	28
6-11-75	XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX	29
6-11-75	Supplemental affidavit in support of pltff's motion filed.	30
6-11-75	Deft's sur-buttal Memorandum of Law filed.	31
6-12-75	File certified and mailed to C of A with Clerk's Certificate and copy of docket sheet.	32

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Summons.

United States District Court

FOR THE

Eastern District of New York

CIVIL ACTION FILE NO. _____

74C 1450

BRUCHHAUSEN, J.

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff

v.

SUMMONS

IRENE SOLOMON and LOUIS SCHUSTER
as Trustee of the S&L Pension
Trust-R.T.B. Industries, Inc.

Defendants

To the above named DefendantS : Irene Solomon

You are hereby summoned and required to serve upon

LeBoeuf, Lamb, Leiby & MacRae

plaintiff's attorney~~s~~, whose address is

One Chase Manhattan Plaza
New York, New York 10005

4a

Summons.

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

S/ Lewis Ongel
Clerk of Court.

S/ Linda Dean
Deputy Clerk.

Date: Oct 11, 1974.

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

NATIONAL LIFE INSURANCE COMPANY, :

Plaintiff, :

740 7450

-against-

COMPLAINT

IRENE SOLOMON and LOUIS SCHUSTER, :
as Trustee of the S&L Pension
Trust-R.T.B. Industries, Inc., :

Defendants. :

- - - - - X

Plaintiff, by its attorneys, LaSalle, Lamb, Leiby
& MacRae, complaining of the defendants herein alleges:

JURISDICTION, VENUE AND PARTIES

1. This court has jurisdiction of this action pursuant to Title 28, United States Code, Section 1332 since the matter in controversy exceeds the sum of \$10,000, exclusive of interests and costs, and is between citizens of different states.

2. Plaintiff National Life Insurance Company is a mutual life insurance corporation organized and existing under the laws of the State of Vermont, with its principal place of business in Montpelier, Vermont.

3. Upon information and belief, defendant Irene Solomon is a citizen of the State of New York, residing at 2815 Shore Drive, Merrick, New York.

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Complaint.

4. Upon information and belief, defendant Louis Schuster is a resident of the State of New York and is the Trustee of the SSL Pension Trust-R.T.B. Industries, Inc., having its principal place of business at 191 Cabot Street, West Babylon, New York.

CLAIM FOR RELIEF

5. On March 20, 1973, Herbert Solomon, the then husband of defendant Irene Solomon, made written application to plaintiff for a life insurance policy in the face amount of Two hundred forty thousand seven hundred and ninety two dollars (\$240,792) in which he was to be the designated insured, his wife, defendant Irene Solomon, was to be the designated principal beneficiary and the Trustees of the S&L Pension Trust-R.T.B. Industries, Inc. were to be designated as the policy owners.

6. Thereafter, on or about June 29, 1973, plaintiff issued a policy of insurance on the life of Herbert Solomon, bearing No. 1462937, in the face amount of \$240,792 dated as of November 30, 1972, at the request of the applicant, and in accordance with the standard practice of predating policies upon request. The said life insurance policy is hereinafter referred to as the "insurance policy."

7. In the application of the insurance policy signed by Herbert Solomon, certain representations, statements and

Complaint.

answers were made. On Part B of the Application (Answers Made to Medical Examiner), the following questions appeared:

"F. To the best of your knowledge, have you ever had:

* * *

"2. Fainting, palpitation, pain around heart, high blood pressure, heart murmur, rheumatic fever, shortness of breath, or any other indication of disease of heart or arteries?

* * *

"F.2 Have you had x-rays or electrocardiograms made during the past five years?

* * *

"G. Have you consulted any physician or other practitioner for advice, treatment or examination within the last five years?

Herbert Solomon's answer to all of these questions was "no."

8. The answers referred to in paragraph 7 above, furnished by Herbert Solomon, were, as he then well knew, untrue in that at the time said application was made, Herbert Solomon had been diagnosed by a physician as suffering from arteriosclerotic heart disease with respect to which he had, within the five years prior to his application, been hospitalized and received medical advice of a physician, as well

Complaint.

as treatments, x-rays and electrocardiograms and had experienced palpitation, dyspnea (shortness of breath), and chest pain.

9. Part B of the application for the insurance policy contained the following question:

"Q. To the best of your knowledge, have you ever had:

* * *

"Q. Disorder of stomach, intestines, liver, gall bladder or ulcer, indigestion, appendicitis, or other disease of digestive tract?"

Herbert Solomon answered this question "no," indicating, however, that he had had an appendectomy in 1933.

10. The answer referred to in paragraph 9 above, furnished by Herbert Solomon was, as he then well knew, untrue in that Herbert Solomon had, in fact, at the time the application was made previously suffered from ulcers.

11. Above the signature of Herbert Solomon on Part A of the application for the insurance policy there appeared the following:

"(1) The foregoing statements and answers are, to the best knowledge and belief of the proposed insured, complete and true and together with the statements and answers on part B of this application shall constitute a part of the contract of insurance if one be issued."

For the reasons hereinbefore set forth such statement together with the statements and answers therein referred to were untrue.

Complaint.

12. Immediately above the signature of Herbert Solomon on Part B of the application (Answers Made to Medical Examiner) there appeared the following:

"I have read the answers to the foregoing questions; they are correctly recorded and they are complete and true, to the best of my knowledge and belief."

For the reasons hereinbefore set forth such statement together with the answers therein referred to were untrue.

13. In preparing, issuing and delivering the insurance policy plaintiff relied on the truth of the representations, statements and answers to the questions contained in the application quoted above and upon each of them and each of such statements and answers was material. If plaintiff had known that the said statements, representations and answers to questions or any of them were not true and that the facts therein had been misrepresented as hereinabove alledged, it would have refused to issue and deliver the insurance policy.

14. By reason of the foregoing facts and circumstances, plaintiff duly elected to and did rescind the said policy on the ground that it was obtained by false representations and concealment of material facts. Plaintiff tendered the return of the premium on said policy, together with interest, to the Trustees of the S&L Pension Trust-R.T.B. Industries, Inc., the designated owner of the policy. Tender was made in the form of a check for \$12,979.07 payable to the order of the Trustees of S&L Pension Trust, R.T.B. Industries, Inc. and mailed to the said Trustees on December 20, 1973.

Complaint.

15. The defendants, Irene Solomon, and the surviving Trustee of S&L Pension Trust P.T.B. Industries Inc., refused the plaintiff's tender by letter of their attorney dated January 18, 1974. On February 5, 1974, the defendants' attorney returned plaintiff's check for \$12,979.67.

16. In the eight months which have elapsed since defendants' attorney last communicated with plaintiff, no action has been brought against this plaintiff nor is any action now pending in any court of this state nor in any other jurisdiction under or by virtue of or upon any alleged cause of action growing out of the insurance policy.

17. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands that it be adjudged and decreed as follows:

1. That the insurance policy be rescinded and rendered null and void and of no effect and that plaintiff be discharged from any and all liabilities with regard to such policy.

2. That the defendant surrender and deliver the insurance policy to the plaintiff for cancellation.

3. That the defendants and each of them, as well as their executors, administrators or assigns, be perpetually restrained from commencing or prosecuting any action or proceeding on account of, or under, or by virtue of the terms of

11a

Complaint.

the insurance policy and that any such action or proceedings as may be commenced by said defendant or any of them, be perpetually stayed.

4. That plaintiff have such other and further relief as to the Court may seem just and proper.

5. The plaintiff have judgment against said defendants and each of them and for the costs and disbursements of this action.

Dated: New York, New York
October 11, 1974

LEBOEUF, LAMB, LEISY & MACRAE
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005

By S/CHARLES P. SIEFFEN
(G. Member)

-6-

First Amended Complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

NATIONAL LIFE INSURANCE COMPANY, :

Plaintiff, : 74 Civ. No. 1450

-against- : FIRST
IRENE SOLOMON and LOUIS SCHUSTER : AMENDED COMPLAINT

as Trustee of the S&L Pension
Trust-R.T.B. Industries, Inc., :

Defendants. :

----- X

Plaintiff, by its attorneys, LeBoeuf, Lamb, Leiby
& MacRae, complaining of the defendants herein alleges:

JURISDICTION, VENUE AND PARTIES

1. This court has jurisdiction of this action pursuant to Title 28, United States Code, Section 1332 since the matter in controversy exceeds the sum of \$10,000, exclusive of interests and costs, and is between citizens of different states.

2. Plaintiff National Life Insurance Company is a mutual life insurance corporation organized and existing under the laws of the State of Vermont, with its principal place of business in Montpelier, Vermont.

3. Upon information and belief, defendant Irene Solomon is a citizen of the State of New York, residing at 2815 Shore Drive, Merrick, New York.

First Amended Complaint.

4. Upon information and belief, defendant Louis Schuster is a resident of the State of New York and is the Trustee of the S&L Pension Trust-R.T.B. Industries, Inc., having its principal place of business at 191 Cabot Street, West Babylon, New York.

CLAIM FOR RELIEF

5. On March 20, 1973, Herbert Solomon, the then husband of defendant Irene Solomon, made written application to plaintiff for a life insurance policy in the face amount of Two hundred forty thousand seven hundred and ninety two dollars (\$240,792) in which he was to be the designated insured, his wife, defendant Irene Solomon, was to be the designated principal beneficiary and the Trustees of the S&L Pension Trust-P.T.B. Industries, Inc. were to be designated as the policy owners.

6. Thereafter, on or about June 29, 1973, plaintiff issued a policy of insurance on the life of Herbert Solomon, bearing No. 1462937, in the face amount of \$240,792 dated as of November 30, 1972, at the request of the applicant, and in accordance with the standard practice of predating policies upon request. The said life insurance policy is hereinafter referred to as the "insurance policy."

7. In the application of the insurance policy signed by Herbert Solomon, certain representations, statements and answers were made. On Part B of the Application (Answers Made to Medical Examiner), the following questions appeared:

First Amended Complaint.

"E. To the best of your knowledge, have you ever had:

* * *

"2. Fainting, palpitation, pain around heart, high blood pressure, heart murmur, rheumatic fever, shortness of breath, or any other indication of disease of heart or arteries?

* * *

"F.2 Have you had x-rays or electrocardiograms made during the past five years?

* * *

"G. Have you consulted any physician or other practitioner for advice, treatment or examination within the last five years?

Herbert Solomon's answer to all of these questions on his signed application form was "no."

8. Upon delivery to him of Policy No. 1462937, Herbert Solomon signed a Request for Amendment of his application, changing his response to question G, above, to "yes", but indicating only that he had consulted Dr. Karl Friedman, 294 West Merrick Road, Freeport, New York, for "checkups and minor complaints" from 1961 through 1972. Defendant Louis Schuster also signed the aforementioned Request for Amendment.

9. The answers referred to in paragraphs 7 and 8 above, furnished by Herbert Solomon, were, as he then well

First Amended Complaint.

knew, untrue in that at the time said application was made, and at the time said amendment was made, Herbert Solomon had been diagnosed by a physician as suffering from arteriosclerotic heart disease with respect to which he had, within the five years prior to his application, been hospitalized and received medical advice of a physician, as well as treatments, x-rays and electrocardiograms and had experienced palpitation, dyspnea (shortness of breath), and chest pain.

10. Part B of the application for the insurance policy contained the following question:

"E. To the best of your knowledge, have you ever had:

* * *

"3. Disorder of stomach, intestines, liver, gall bladder or ulcer, indigestion, appendicitis, or other disease of digestive tract?"

Herbert Solomon answered this question by stating that he had had an appendectomy in 1933.

11. The answer referred to in paragraph 10 above, furnished by Herbert Solomon was, as he then well knew, untrue in that Herbert Solomon had, in fact, at the time the application was made, previously suffered from ulcers.

12. Above the signature of Herbert Solomon on Part A of the application for the insurance policy there appeared the following:

First Amended Complaint.

"(1) The foregoing statements and answers are, to the best knowledge and belief of the proposed insured, complete and true and together with the statements and answers on part B of this application shall constitute a part of the contract of insurance if one be issued."

For the reasons hereinbefore set forth such statement together with the statements and answers therein referred to were untrue.

13. Immediately above the signature of Herbert Solomon on Part B of the application (Answers Made to Medical Examiner) there appeared the following:

"I have read the answers to the foregoing questions; they are correctly recorded and they are complete and true, to the best of my knowledge and belief."

For the reasons hereinbefore set forth such statement together with the answers therein referred to were untrue.

14. In preparing, issuing and delivering the insurance policy plaintiff relied on the truth of the representations, statements and answers to the questions contained in the application and the amendment thereto quoted above and upon each of them and each of such statements and answers was material. If plaintiff had known that the said statements, representations and answers to questions or any of them were not true and that the facts therein had been misrepresented as hereinabove alleged, it would have refused to issue and deliver the insurance policy.

15. By reason of the foregoing facts and circumstances, plaintiff duly elected to and did rescind the said policy

First Amended Complaint.

on the ground that it was obtained by false representations and concealment of material facts. Plaintiff tendered the return of the premium on said policy, together with interest, to the Trustees of the S&L Pension Trust-R.T.B. Industries, Ins., the designated owner of the policy. Tender was made in the form of a check for \$12,979.07 payable to the order of the Trustees of S&L Pension Trust, R.T.B. Industries Inc. and mailed to the said Trustees on December 20, 1973.

16. The defendants, Irene Solomon, and the surviving Trustee of S&L Pension Trust R.T.B. Industries Inc., refused the plaintiff's tender by letter of their attorney dated January 18, 1974. On February 8, 1974, the defendants' attorney returned plaintiff's check for \$12,979.07.

17. In the eight months which have elapsed since defendants' attorney last communicated with plaintiff, no action has been brought against this plaintiff nor is any action now pending in any court of this state nor in any other jurisdiction under or by virtue of or upon any alleged cause of action growing out of the insurance policy.

18. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands that it be adjudged and decreed as follows:

First Amended Complaint.

1. That the insurance policy be rescinded and rendered null and void and of no effect and that plaintiff be discharged from any and all liabilities with regard to such policy.
2. That the defendant surrender and deliver the insurance policy to the plaintiff for cancellation.
3. That the defendants and each of them, as well as their executors, administrators or assigns, be perpetually restrained from commencing or prosecuting any action or proceeding on account of, or under, or by virtue of the terms of the insurance policy and that any such action or proceedings as may be commenced by said defendant or any of them, be perpetually stayed.
4. That plaintiff have such other and further relief as to the Court may seem just and proper.
5. The plaintiff have judgment against said defendants and each of them and for the costs and disbursements of this action.

Dated: New York, New York
December 19, 1974

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005

By S/CHAS S SIFTON

Notice of Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

NATIONAL LIFE INSURANCE COMPANY,	:	
Plaintiff,	:	
- against -	:	74 Civ. No. 1450
IRENE SOLOMON and LOUIS SCHUSTER, as Trustee of the S & L Pension Trust - R.T.B. Industries, Inc.,	:	<u>NOTICE OF MOTION FOR SUMMARY JUDGMENT</u>
Defendants.	:	

----- x

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of William J. Godfrey, M.D., Nicholas Kuzmowycz, M.D., Rowland Ricketts, Jr., Brian McCracken, M.D., Karl Friedman, M.D. and Edward Braverman, M.D., and upon the amended complaint herein, the undersigned will move this Court, pursuant to General Rule 9 of the Rules of this Court, before the Honorable Walter Bruchhausen, Senior United States District Judge, in Room 3 of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 5th day of March, 1975 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary

Notice of Motion for Summary Judgment.

judgment in plaintiff's favor for the relief demanded in the amended complaint on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law.

Yours, etc.

LeBOEUF, LAMB, LEIBY & MacRAE

Dated: New York, N.Y.
February 1, 1975

By C. P. Sifton
Charles P. Sifton

Attorneys for Plaintiff
Office and P.O. Address
140 Broadway
New York, New York 10005
(212) 262-1100

TO: ALLAN BAKST, ESC.
Attorney for Defendants
21 East 40th Street
New York, New York 10016

RIVKIN, LEFF & SHERMAN
Attorneys for Defendants
55 North Ocean Avenue
P.O. Box 669
Freeport, New York 11520

Affidavit of Dr. William J. Godfrey in Support
of Plaintiff's Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

NATIONAL LIFE INSURANCE COMPANY	:	
Plaintiff,	:	74 Civ. No. 1450
v.	:	AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
IRENE SOLOMON and LOUIS SCHUSTER as Trustee of the S&L Pension Trust-R.T.B. Industries, Inc.	:	
Defendants.	:	
STATE OF NEW YORK)	:	
: ss.:		
COUNTY OF NASSAU)	:	

Dr. William J. Godfrey, M.D., being duly sworn,
deposes and says:

1. I am, and I was at all times mentioned herein,
a medical doctor duly licensed to practice medicine in the
state of New York.

2. I make this affidavit on the basis of personal
knowledge and medical records currently in my possession and
maintained by me in the ordinary course of my medical
practice.

3. My records reflect that on March 27, 1973, I
examined Herbert Solomon, of 2815 Shore Road, Merrick,
New York, in my office, at the request of National Life
Insurance Company.

Affidavit of Dr. Godfrey.

4. At that time I asked Herbert Solomon the questions contained in Part B of the National Life Insurance Company application for life insurance, and recorded Mr. Solomon's answers thereto within Mr. Solomon's full view. I signed said application, as did Herbert Solomon.

5. A copy of the aforementioned application is attached hereto and made a part of this affidavit. I recognize my signature on said application, and the application reflects the answers given to me by Herbert Solomon to the best of my knowledge and belief.

William J. Godfrey, M.D.
Dr. William J. Godfrey, M.D.

Sworn to before me this
17 day of February, 1975.

Marian Metzger
Notary Public

MARIAN METZGER
NOTARY PUBLIC, State of New York
No. 52-7915473 - Suffolk County
Commission Expires March 30, 1976

1. Full name of Proposed Insured		2. Date of birth	3. Place of birth
		Age / years	If any question is answered "Yes," give dates and details.
<p>B. 1. To the best of your knowledge, is your health impaired or are you in any way deformed or crippled?</p> <p>2. Have you received a medical separation or discharge from any branch of the armed forces?</p> <p>3. Have you applied for or received disability compensation from any source?</p>			
<p>C. 1. Have you ever taken treatment for alcoholism or drug habit?</p> <p>2. Have you ever used hallucinogens, opium, cocaine or other narcotics, except under the advice of a physician?</p>			
<p>D. 1. To the best of your knowledge, has any member of your family had diabetes, tuberculosis, insanity or epilepsy?</p> <p>2. To the best of your knowledge, have you ever lived in the same house or been otherwise closely associated with anyone having tuberculosis?</p> <p>3. Have you ever been advised by a physician or other practitioner to change your residence or occupation because of your health?</p>			
<p>E. To the best of your knowledge, have you ever had:</p> <p>1. Spitting of blood, habitual cough, asthma, pleurisy or tuberculosis?</p> <p>2. Fainting, palpitation, pain around heart, high blood pressure, heart murmur, rheumatic fever, shortness of breath, or any other indication of disease of heart or arteries?</p> <p>3. Disorder of stomach, intestines, liver, gall bladder, pancreas, indigestion, appendicitis, or other disease of digestive organs?</p> <p>4. Renal colic, stone, ureter, or any disorder of kidneys, bladder or excretory organs?</p> <p>5. Malaria, leprosy, syphilis, cancer or other tumor?</p> <p>6. Disorder of eyes, ears, nose or throat?</p> <p>7. Dizzy spells, convulsion, paralysis, unconsciousness, nervous or mental trouble?</p> <p>8. Disease of skin, glands, bones, joints, or spine?</p> <p>9. Albumin, casts, pus or blood in the urine?</p>			
<p>F. 1. Have you ever dieted, taken insulin, or oral medication, for sugar in your urine?</p> <p>2. Have you had x-rays or electrocardiograms made during the past five years? If so, when, for what reason and by whom?</p> <p>3. Have you ever been in or do you plan to enter a hospital or sanitarium for operation, observation or treatment?</p>			
<p>G. Have you consulted any physician or other practitioner for advice, treatment or examination within the last five years?</p>			

None and soon after

Reason for consultation

Date, duration and results

H. Family History		1. Adult female:
Father	Mother	Married since 19 th June
Sister		2. Children born: Number? ... Date of last?
Brother		3. To the best of your knowledge, are you now pregnant?
Date of birth		If so, what month?
		4. To the best of your knowledge, have you passed the climacteric?
		5. Have you ever had:
		Menstrual disorder or disease of pelvic organs or breast?
		Miscarriage?
		Difficult labor or Cesarean operation?
I declare that the above answers to my questions, they are correctly recorded and they are complete and true, to the best of my knowledge and belief.		
Date	19 th	Signature of Insured
Witnessed by		Signature of Agent

Affidavit of Dr. Nicholas Kuzmowycz in Support
of Plaintiff's Motion for
Summary Judgment.
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

NATIONAL LIFE INSURANCE COMPANY :
Plaintiff, : 74 Civ. No. 1450
v. :
IRENE SOLOMON and LOUIS SCHUSTER : AFFIDAVIT IN SUPPORT
as Trustee of the S&L Pension : OF PLAINTIFF'S MOTION
Trust-R.T.B. Industries, Inc. : FOR SUMMARY JUDGMENT
Defendants. :
- - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

Dr. Nicholas Kuzmowycz, M.D., being duly sworn, deposes
and says.

1. I am, and I was at all times mentioned herein,
a medical doctor duly licensed to practice medicine in the
state of New York.
2. I make this affidavit on the basis of personal
knowledge and medical records currently in my possession and
maintained by me in the ordinary course of my medical practice.
3. My records reflect that on March 27, 1973, I
examined Herbert Solomon, of 2815 Shore Road, Merrick,
New York, in my office, at the request of National Life
Insurance Company.

Affidavit of Dr. Nicholas Kuzmowycz.

4. At that time I either read to Herbert Solomon the questions contained in Part B of the National Life Insurance Company application for life insurance or provided him with a copy of said application to read himself, and I then recorded Mr. Solomon's answers thereto, within Mr. Solomon's full view. I signed said application, as did Herbert Solomon.

5. A copy of the aforementioned application is attached hereto and made a part of this affidavit. I recognize my signature on said application, and the application reflects the answers given to me by Herbert Solomon to the best of my knowledge and belief.

Nicholas Kuzmowycz
Dr. Nicholas Kuzmowycz, M.D.

Sworn to before me this
1st day of February, 1975.

Marian Metzger
Notary Public

MARIAN METZGER
NOTARY PUBLIC, State of New York
No. 51-771,473 - Suffolk County
Commission Expires March 30, 1976

Exhibit Annexed to Affidavit of
Dr. Kuzmowycz.

ITEMS TO BE ANSWERED BY THE MEDICAL EXAMINER		(See also section 1012)	
<p>1. Do you regularly take the prescribed medicine? <u>NO</u></p> <p>3. Does accused calculate health and safety? <u>NO</u></p>		<p>1. Are you married? <u>NO</u></p> <p>4. Any deformity or lesion of limb? <u>NO</u></p>	
<p>K. 1. Height <u>5 ft 10 in</u> inches <u>0</u></p> <p>2. Weight <u>170</u> inches <u>0</u> lbs</p>		<p>3. Girth Chest at Respiration <u>36</u> Chest at Maximum Inspiration <u>38</u> Abdomen <u>32</u></p>	
<p>L. 1. Blood pressure Systolic <u>130</u> Diastolic <u>80</u></p>		<p>4. Did you weight <u>170</u>? Did you measure <u>170</u>? 5. Change in weight since last visit <u>0</u></p>	
<p>M. Heart: (Ask patient to stand and recline in position before and after exercise)</p> <p>1. Are the heart sounds normal? <u>Yes</u></p> <p>2. Are there any murmurs present? <u>No</u></p> <p>3. Is there any evidence of: Cardiac enlargement? <u>No</u> Arrhythmia? <u>No</u> Varicosities? <u>No</u></p>		<p>6. If no murmur is heard, complete heart examination. Detach form from page</p>	
<p>N. Does patient complain of any abnormality of:</p> <p>1. Skin? <u>No</u></p> <p>2. Eyes? <u>No</u></p> <p>3. Ears? <u>No</u></p> <p>4. Mouth? <u>No</u></p> <p>5. Nose? <u>No</u></p> <p>6. Respiratory organs? <u>No</u></p> <p>7. Thyroid? <u>No</u></p> <p>8. Menses? <u>No</u></p>		<p>7. Examine one or more internal organs:</p>	
<p>O. 1. Urine: (Ask patient to urinate, and examine specimen which is collected)</p> <p>1. Color? <u>Clear</u></p> <p>2. Aroma? <u>None</u></p> <p>3. Specific Gravity? <u>1.02</u></p> <p>4. Any albuminuria? <u>No</u></p> <p>5. Hematuria? <u>No</u></p>		<p>NOTE: if specimen is under 1012, collect additional specimen after restriction of fluids and complete examination. The specimen must be forwarded to the Home Office for microscopic analysis when A. Insured's application in this company exceeds £50,000. B. A sum of £500 is claimed. C. Blood pressure reading is over 140 mm. of Hg. or 90 diastolic. D. There is evidence of casts in urinary tract.</p>	
<p>P. 1. What is your opinion? <u>NO</u></p> <p>R. Do you know anything of proposed insured's habits, environment or other factors which might aid in the appraisal of the risk? <u>NO</u></p>		<p>1. 2. Was any third person present? <u>NO</u></p>	
<p>Remarks:</p>		<p>APR 13 1958</p>	
<p>Witnessed by <u>John J. Kuzmowycz</u> on <u>11/03/58</u> at <u>1023 1/2 AM</u></p>		<p>Signature <u>John J. Kuzmowycz</u> Date <u>11/03/58</u></p>	

Affidavit of Rowland Ricketts, Jr., in Support
of Plaintiff's Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NATIONAL LIFE INSURANCE COMPANY :
Plaintiff, : 74 Civ. No. 1450
v. : AFFIDAVIT IN SUPPORT
IRENE SOLOMON and LOUIS SCHUSTER : OF PLAINTIFF'S MOTION
as Trustee of the S&L Pension FOR SUMMARY JUDGMENT
Trust-R.T.B. Industries, Inc. :
Defendants. :

----- x

STATE OF VERMONT)
: ss.:
COUNTY OF)

Rowland Ricketts, Jr., being duly sworn, deposes and says:

1. I am the Assistant Director of Underwriting of the National Life Insurance Company, the above named plaintiff, and I have held this position or the position of Senior Underwriter for more than three years, including all of the times mentioned herein.

2. I make this affidavit on the basis of personal knowledge and records currently in the possession of National Life Insurance Company, which are maintained by said Company in the ordinary course of its business.

3. My duty as Assistant Director of Underwriting is to examine applications for life and disability insurance, and to decide on the basis of the information in completed applications, and upon the advice of a Medical Director of National Life Insurance Company, whether or not to enter into contracts of life and disability insurance.

Affidavit of Rowland Ricketts, Jr.

4. On or about May 25, 1973, I examined the application of Herbert Solomon, 1815 Shore Road, Merrick, New York, for a life insurance policy in the amount of \$240,792.

5. Based upon statements made by Mr. Solomon in his application, and upon the approval of the Medical Director of National Life Insurance Company, Dr. Brian McCracken, M.D., I approved Mr. Solomon's application on May 25, 1973 by initialling an approval sheet provided for this policy. A copy of policy number 1462937, which was issued upon the life of Herbert Solomon is attached hereto. Included in the policy are the Application, and the Request for Amendment of Application signed by Herbert Solomon. Part "B" of the Application entitled "Answers Made To Medical Examiner" was completed twice since two physicians examined Mr. Solomon.

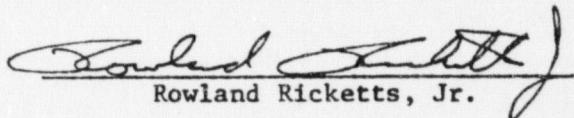
6. I have read the affidavits of Dr. Karl Friedman, M.D. and Dr. Edward Braverman, M.D., herein. I have also read the affidavit of Dr. Brian McCracken, Medical Director of National Life Insurance Company. Having read such affidavits, it has come to my attention that prior to his application for life insurance policy No. 1462937, and for a period of approximately fifteen years, Mr. Solomon had been suffering from recurring chest pains, for which he had been consulting a physician and undergoing EKG examinations, and furthermore that from November 29, 1972 to December 3, 1972 Herbert Solomon had been hospitalized and diagnosed to have been suffering from arteriosclerotic heart disease with angina pectoris.

7. This information was not indicated in Herbert Solomon's application when it was presented to me, in fact, the applicant stated

Affidavit of Rowland Ricketts.

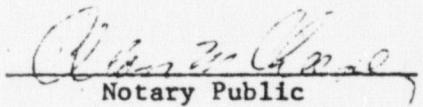
therein that he had never suffered from any disease of the heart or arteries, and that, within the last five years he had consulted a physician only for check ups and minor complaints, the results of which were all normal.

8. As a matter of standard procedure, had I been aware of Herbert Solomon's actual medical history, and had a Medical Director of National Life Insurance Company recommended disapproval of Herbert Solomon's application, based upon information now known to him and to me, I would have refused, on behalf of National Life Insurance Company, to enter into the contract of life insurance which is in question herein.



Rowland Ricketts, Jr.

Sworn to before me this
12th day of February, 1975.



Notary Public

Affidavit of Dr. Brian McCracken, in Support of Plaintiff's
Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NATIONAL LIFE INSURANCE COMPANY :

Plaintiff, : 74 Civ. No. 1450

v. : AFFIDAVIT IN SUPPORT
IRENE SOLOMON and LOUIS SCHUSTER : OF PLAINTIFF'S MOTION
as Trustee of the S&L Pension FOR SUMMARY JUDGMENT

Trust-R.T.B. Industries, Inc. :

Defendants. :

- - - - - x

STATE OF VERMONT)

:

COUNTY OF)

Dr. Brian McCracken, M.D., being duly sworn, deposes and says:

1. I am one of three Medical Directors of the National Life Insurance Company, the above named plaintiff, and I have held this position or the position of Associate Medical Director for three years, including all of the times mentioned herein.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of plaintiff's motion for summary judgment.

3. My primary duty with National Life Insurance Company is to evaluate the medical aspects of policy applications.

4. On or about May 25, 1973, I reviewed the application of Herbert Solomon, 1815 Shore Road, Merrick, New York, for a life insurance policy in the amount of \$240,792.

Affidavit of Dr. Brian McCracken.

5. After examination of Herbert Solomon's completed application, I recommended approval of said application and indicated this approval to the Underwriting Department of the National Life Insurance Company.

6. I have read the affidavits of Dr. Karl Friedman, M.D. and Dr. Edward Braverman, M.D., herein. Having read such affidavit, it has come to my attention that prior to his application for life insurance policy No. 1462937, and for a period of approximately fifteen years, Mr. Solomon had been suffering from recurring chest pains, for which he had been consulting a physician and undergoing EKG examinations, and furthermore that from November 29, 1972 to December 3, 1972 Herbert Solomon had been hospitalized and diagnosed to have been suffering from arteriosclerotic heart disease with angina pectoris class II-B.

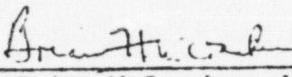
7. This information was not indicated in Herbert Solomon's application when it was presented to me, in fact, the applicant stated therein that he had never suffered from any disease of the heart or arteries, and that, within the last five years he had consulted a physician only for check ups and minor complaints, the results of which were all normal.

8. Arteriosclerotic heart disease is a condition of the arteries which supply blood to the heart. It is characterized by a hardening and thickening of artery walls accompanied by a loss of elasticity, all of which result in a reduction of the nourishment which goes to the heart. Angina pectoris is chest pain which arises suddenly and intermittently as a result of an increased demand by the heart, which cannot be met due to the thickening and hardening of the arteries. Other symptoms of arteriosclerotic heart disease are dyspnea, which means shortness of

Affidavit of Dr. Brian McCracken.

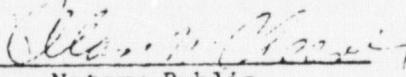
breath or labored breathing, and palpitation, which is a fluttering of the heart or an abnormally rapid beating of the heart which is felt by the patient. Class II-B means that although the patient may have some symptoms, he need not restrict his normal daily activity. A medical history which includes a diagnosis of arteriosclerotic heart disease with angina pectoris is directly relevant in determining how long a patient is likely to live. Other terminology often employed to indicate the same condition includes coronary heart disease and coronary insufficiency.

9. As a matter of standard procedure, had I known that Herbert Solomon had ever been hospitalized for or diagnosed as having suffered from arteriosclerotic heart disease, I would not have recommended approval of his application for life insurance policy No. 1462937.



Dr. Brian McCracken, M.D.

Sworn to before me this
1st day of February, 1975.



Notary Public

Affidavit of Dr. Karl Friedman in Support of Plaintiff's
UNITED STATES DISTRICT COURT Motion for Summary Judgment.
EASTERN DISTRICT OF NEW YORK

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NATIONAL LIFE INSURANCE COMPANY	:	
Plaintiff,	:	74 Civ. No. 1450
v.	:	AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION <u>FOR SUMMARY JUDGMENT</u>
IRENE SOLOMON and LOUIS SCHUSTER as Trustee of the S&L Pension Trust-R.T.B. Industries, Inc.	:	
Defendants.	:	

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STATE OF NEW YORK)	
	: ss.:
COUNTY OF NASSAU)	

Dr. Karl Friedman, M.D., being duly sworn, deposes
and says:

1. I am, and I was at all times mentioned herein,
a medical doctor duly licensed to practice medicine in the
state of New York.
2. I make this affidavit on the basis of medical
records currently in my possession and maintained by me in the
ordinary course of my medical practice. Those records reflect
the following.
3. On October 31, 1957, I examined Herbert Solomon,
of 2815 Shore Road, Merrick, New York, at his residence, at
which time Mr. Solomon was complaining of severe chest pains.

Affidavit of Dr. Karl Friedman.

4. At that time I was informed by Herbert Solomon that he had undergone an electrocardiogram test at French Hospital two days before I first examined him.

5. Thereafter, on November 4, 1957, Herbert Solomon came to my office where he again underwent an electrocardiogram test.

6. On February 4, 1962 my records reflect that Herbert Solomon was given an electrocardiogram test at Long Island Jewish Hospital following exercise.

7. On March 12, 1962, Herbert Solomon again visited my office complaining of recurrent chest pains, and an electrocardiogram test was again performed upon him.

8. On August 13, 1965, Herbert Solomon returned to my office complaining of chest pains, and an electrocardiogram test was again performed upon him.

9. On August 28, 1967, Herbert Solomon returned to my office complaining of chest pains. At that time he advised me that he had undergone an electrocardiogram examination following exercise three months before this visit to me under the supervision of Dr. Herman Ruskin.

10. On September 19, 1967, my records reflect that Herbert Solomon underwent a chest x-ray and an electrocardiogram examination at Brookdale Medical Center, Brooklyn, New York.

Affidavit of Dr. Karl Friedman.

11. On August 19, 1968, Herbert Solomon returned to my office complaining of chest pains and an electrocardiogram test was again performed upon him.

12. On May 6, 1971, Herbert Solomon returned to my office and an electrocardiogram test was performed upon him.

13. On May 8, 1972, Herbert Solomon returned to my office complaining of chest pains, and another electrocardiogram test was performed upon him.

14. I wish to state that Herbert Solomon informed me that he was admitted to Doctors Hospital, Freeport, New York, and was under the care of Dr. Ruskin and Dr. Braverman, on November 29, 1972 and remained there until his discharge on December 3, 1972. I also wish to indicate that Herbert Solomon's diagnosis upon his discharge from Doctors Hospital on December 3, 1972, was that he was suffering from arteriosclerotic heart disease with angina pectoris class II-B.

Isi KARL FRIEDMAN M.D.
Dr. Karl Friedman, M.D.

Sworn to before me this
18th day of February, 1975.

Isi CAROL WAGNER
Notary Public

CAROL WAGNER
Notary Public, State of New York
No. 24-4123745
Columbia County
Certified Notary Public, New York County
Commission Expires March 30, 1975

Affidavit of Dr. Edward Braverman in Support of
Plaintiff's Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NATIONAL LIFE INSURANCE COMPANY :
Plaintiff, : 74 Civ. No. 1450
v. :
: AFFIDAVIT IN SUPPORT
IRENE SOLOMON and LOUIS SCHUSTER :
as Trustee of the S&L Pension :
Trust-R.T.B. Industries, Inc. :
Defendants. :
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STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

Dr. Edward Braverman, M.D., being duly sworn, deposes
and says:

1. I am, and I was at all times mentioned herein,
a medical doctor duly licensed to practice medicine in the
State of New York.

2. I make this affidavit on the basis of medical
records currently in my possession and maintained by me in the
ordinary course of my medical practice. Those records reflect
the following.

3. On February 15, 1967, I examined Herbert Solomon,
of 2815 Shore Road, Merrick, New York, in my office, at which
time Mr. Solomon was complaining of chest pains, and an ulcer
condition. An EKG test was performed upon Mr. Solomon on that
date.

Affidavit of Edward Braverman.

4. I next saw Herbert Solomon on November 29, 1972, when Mr. Solomon was admitted to Doctors Hospital in Freeport, New York. On that date, Mr. Solomon was complaining of chest pains which he said he had been suffering from, intermittently, for several months.

5. Upon his admission to Doctors Hospital, Mr. Solomon's symptoms were intermittent chest pains radiating to the left arm.

6. My admitting diagnosis of Herbert Solomon's condition was that he had suffered a possible coronary.

7. Herbert Solomon remained in Doctors Hospital, under my care, until December 3, 1972. While in the hospital, Mr. Solomon underwent serial EKGs, and a chest x-ray, and was treated with bedrest, intravenous fluids, and valium.

8. Upon his discharge on December 3, 1972, my diagnosis of Herbert Solomon's condition was that he was suffering from arteriosclerotic heart disease with angina pectoris, class II-B.

9. At the time of his discharge, Herbert Solomon was given a prescription for Nitrostat and Nitrospan and was released to be followed by his family physician, Dr. Karl Friedman.

10. On February 7, 1973, Herbert Solomon returned to my office to consult with me with regard to his heart condition and he underwent an EKG test on that date.

Affidavit of Edward Braverman.

11. On March 8, 1973, Herbert Solomon again returned to my office to consult with me with regard to his heart condition.

12. On April 11, 1973, Herbert Solomon again returned to my office to consult with me with regard to his chest pain.

13. On June 11, 1973, Herbert Solomon returned again to my office to consult with me with regard to his chest pain.

14. A copy of the Discharge Summary which I prepared upon Herbert Solomon's discharge from Doctors Hospital is attached hereto and made a part of this affidavit. I recognize my signature on said progress report, and it reflects my observations of Herbert Solomon, while in Doctors Hospital, to the best of my knowledge and belief.

Edward Braverman
Dr. Edward Braverman, M.D.

Sworn to before me this
13th day of February, 1975.

Margaret S. Brown
Notary Public

NOTARY PUBLIC
STATE OF NEW YORK
BROOKLYN COUNTY
APR 12 1975
MARGARET S. BROWN
Notary Public No. 16

Exhibit Annexed to Affidavit of
Dr. Braverman.

DOCTORS HOSPITAL

REPORT, N.Y.

PROGRESS RECORD

SOLOMON, HERBERT

A52602

DATE	NOTE PROGRESS OF CASE, COMPLICATIONS, CONSULTATIONS, CHANGE IN DIAGNOSIS, CONDITION ON DISCHARGE, INSTRUCTIONS TO PATIENT
DISCHARGE SUMMARY	
Adm. 11-20-72	
Disch. 12-03-72	
DISCHARGE DIAGNOSIS:	1. Arteriosclerotic heart disease with angina pectoris, Class IIIB.
HISTORY:	This is a 54-year old white male who for several months has had intermittent chest pain when active relieved by rest. Two days prior to admission he woke up at night with a tight feeling in the chest radiating to the left arm. This lasted several hours. It has recurred intermittently since until the time of admission. The pain was aggravated by respiration. It has recurred intermittently since until the time of admission.
PHYSICAL EXAMINATION:	Pulse 84. B.P. 130/80. HEENT examination was unremarkable. Lungs were clear. Heart sounds were of good quality. There was no rub heard. Examination of the abdomen and extremities was unremarkable.
LABORATORY DATA:	Serial EKG's were within normal limits. Chest X-ray was within normal limits. CBC: Unremarkable. Urinalysis unremarkable. Serial SGOT, LDH were unremarkable. CPK was normal. Cholesterol 255, Glucose 92, BUN 14, uric acid 6.1. 2-hr. post餐 blood sugar 82.
HOSPITAL COURSE:	While in the hospital, the patient was initially treated with bedrest, intravenous fluids and Valium. During his hospital stay, there was no further acute pain. I feel on the basis of his history that the patient has angina pectoris. He was given a prescription for Nitrostat grains 1/150th to be taken prn; Nitrogran 2.5 mg. 12h and aspirin 5 grains b.i.d. The patient wants to go home at the present time and it is strongly suggested that he had a G.I. series and gallbladder series as an outpatient, an exercise test would also be indicated. The patient is being discharged to be followed by his family physician, Dr. Karl Friedman.
	<i>C. Braverman</i> Edward Braverman, M.D.
12-03-72	
12-03-72	
CC. Dr. K. Friedman	PROGRESS RECORD

Statement Pursuant to Rule 9(g).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NATIONAL LIFE INSURANCE COMPANY :
Plaintiff, : 74 Civ. No. 1450
v. : STATEMENT PURSUANT TO
: GENERAL RULE 9(g) OF
: THE GENERAL RULES OF
: THE COURT

IRENE SOLONON and LOUIS SCHUSTER :
as Trustee of the S&L Pension
Trust-R.T.B. Industries, Inc. :
Defendants. :

----- X

The plaintiff contends that there is no genuine issue
to be tried in that:

1. Herbert Solomon made misrepresentations as to his physical condition and as to medical treatments therefore in his application to the plaintiff for a policy of life insurance.

2. In reliance on said misrepresentations, plaintiff issued a life insurance policy on the life of Herbert Solomon, the beneficiary of which policy was defendant Irene Solomon and the owner of which policy was the defendant Louis Schuster, as Trustee of the S&L Pension Trust-R.T.B. Industries, Inc.

3. The misrepresentations made were material.

Answer.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NATIONAL LIFE INSURANCE COMPANY,

ANSWERING DEFENDANT
DEMANDS A TRIAL BY
JURY

Plaintiff,

-against-

74 Civ. No. 1450

IRENE SOLOMON and LOUIS SCHUSTER,
as Trustee of the S & L Pension
Trust - R.T.B. Industries, Inc.,ANSWER

Defendants.

-----x

Defendants by their attorneys, RIVKIN, LEFF & SHERMAN, ESQS.
answering the First Amended Complaint of the plaintiff herein,
respectfully states and alleges:

FIRST: Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph's of plaintiff's complaint numbered "1" except admits that the controversy is over \$10,000 and leaves all questions of law to the Court.

SECOND: Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered "2", "7" and "8" of plaintiff's complaint.

THIRD: Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "6", except admits that the plaintiff issued policy numbered 1462937 on the life of HERBERT SOLOMON in the face amount of \$240,792.00.

FOURTH: Denies each and every allegation contained in paragraphs numbered "9", "10", "11", "12", "13", "14", "15" of plaintiff's complaint.

Answer.

**AS AND FOR A FIRST, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE TO
PLAINTIFF'S COMPLAINT:**

FIFTH: Plaintiff is estopped from denying the validity of the policy of insurance heretofore mentioned due to the full and complete knowledge of plaintiff's agent's servants and/or employees as to all of the facts and circumstances claimed herein.

**AS AND FOR A SECOND, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE TO
PLAINTIFF'S COMPLAINT:**

SIXTH: Plaintiff is estopped from denying the validity of the policy of insurance heretofore mentioned due to the fact that there was no reliance on the alleged misrepresentation, etc.

**AS AND FOR A THIRD, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE TO
PLAINTIFF'S COMPLAINT:**

SEVENTH: Plaintiff is estopped from denying the validity of the policy of insurance heretofore mentioned due to the fact that it had, would have and still does issue similar policies of life insurance with the factual background mentioned herein.

**AS AND FOR A FOURTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE TO
PLAINTIFF'S COMPLAINT:**

EIGHTH: Plaintiff is estopped from denying the validity of the policy of insurance heretofore mentioned due to the fact that there was a ratification of the contract of insurance hereinabove mentioned.

**AS AND FOR A FIFTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE TO
PLAINTIFF'S COMPLAINT:**

Answer.

NINTH: Plaintiff is estopped from denying the validity of the policy of insurance heretofore mentioned due to the fact that there was a novation of the contract of insurance hereinabove mentioned.

AS AND FOR A COUNTER-CLAIM BY
THE DEFENDANTS AGAINST THE
PLAINTIFF HEREIN:

TENTH: That on or about the year 1972 and/or the year 1973, the plaintiff issued a policy of insurance on the life of HERBERT SOLOMON bearing policy number 1462937 in the face amount of \$240,792.00 wherein the defendant IRENE SOLOMON, was designated principal beneficiary.

ELEVENTH: That on the 8th day of September, 1973, the assured HERBERT SOLOMON died as a result of a homicide.

TWELFTH: That demand was made pursuant to the terms of said policy for payment of the principal amount of said policy which demand has been refused all the damage of the defendants in the sum of \$240,792.00, plus interests, costs and disbursements.

WHEREFORE, the defendants herein demand that all causes of action of the plaintiff be dismissed with costs and that the counter-claim in the sum of \$240,792.00, plus interests, costs and disbursements be granted.

Yours, etc.,

RIVKIN, LEFF & SHERMAN, ESQS.

BY:

LEONARD L. RIVKIN
Attorneys for defendants
Office and P. O. Address
55 North Ocean Avenue
Freeport, New York 11520

44a

Answer.

TO:

LeBOEUF, LAMB, LEIBY & MACKAL
Attorneys for Plaintiff
140 Broadway
New York, New York 10005

Notice to Admit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NATIONAL LIFE INSURANCE COMPANY,

Plaintiff,

74 Civ. No. 1450

-against-

IRENE SOLOMON and LOUIS SCHUSTER, as
Trustee of the S & L Pension Trust -
R.T.B. Industries, Inc.,

NOTICE TO ADMIT

Defendants.

-----x
S I R S :

The defendants, by their attorneys, RIVKIN, LEFF & SHERMAN,
ESQS., hereby request that you admit the following facts:

1. That Irving R. Aaronson was an agent of the plaintiff at the time the application for the instant policy was executed.
2. That Irving R. Aaronson was an agent of the plaintiff at the time the amendment to the application was executed.
3. That Irving R. Aaronson was an agent of the plaintiff for a period of at least five (5) years prior to the execution of the first application for the life insurance policy at issue herein.
4. That Irving R. Aaronson was an agent of the plaintiff acting within the scope of his authority at the time of the initial application herein.
5. That Irving R. Aaronson was an agent of the plaintiff acting within the scope of his authority at the time of the amendment of the application herein.
6. That in the year 1972, Irving R. Aaronson was acting as an agent for the company for the purpose of procuring applications

Notice to Admit.

for life insurance.

7. That in the year 1973, Irving R. Aaronson was acting as an agent for the company for the purpose of procuring applications for life insurance.

8. That in the year 1972, John A. Newman Agency was an agent of the plaintiff for the purpose of procuring applications for life insurance policies

9. That in the year 1973, John A. Newman Agency was an agent of the plaintiff for the purpose of procuring applications for life insurance policies.

10. In the year 1972, John A. Newman Agency had the authority to appoint sub-agents for the purpose of accepting applications for life insurance.

11. In the year 1973, John A. Newman Agency had the authority to appoint sub-agents for the purpose of accepting applications for life insurance.

12. In the year 1972, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to solicit applications for life insurance.

13. In the year 1973, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to solicit applications for life insurance.

14. In the year 1972, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to receive applications for life insurance.

15. In the year 1973, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to

Notice to Admit.

receive applications for life insurance.

15. In the year 1972, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to collect the first premium for life insurance.

16. In the year 1973, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to collection the first premium for life insurance.

17. In the year 1972, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to receive claims for life insurance.

18. In the year 1973, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to receive claims for life insurance.

19. In the year 1972, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to deliver policies of life insurance.

20. In the year 1973, Irving R. Aaronson was an agent of the plaintiff or sub-agent of the plaintiff with the authority to deliver policies of life insurance.

21. That plaintiff had two physical examinations of HERBERT SOLOMON prior to the issuance of its policy of insurance herein.

22. That the aforementioned two physicals were conducted by physicians of the choosing of the plaintiff.

23. Prior to the issuance of the policy herein, plaintiff has issued policies of insurance without rating same to persons with Arteriosclerotic Heart Disease.

Notice to Admit.

24. Prior to the issuance of the policy herein, plaintiff has issued policies of insurance without rating same to persons with a history of ulcers.

25. Prior to the issuance of the policy herein, plaintiff has issued policies of insurance with rating same to persons with Arteriosclerotic Heart Disease.

26. Prior to the issuance of the policy herein, plaintiff has issued policies of insurance with rating same to persons with a history of ulcers.

27. That a history of ulcers does not in any way affect the life span of an individual.

Dated: Freeport, New York
February 18, 1975

Yours, etc.,

RIVKIN, LEFF & SHERMAN, ESQS.,

BY:

LEONARD L. RIVKIN
Attorneys for Defendants
Office and P. O. Address
55 North Ocean Avenue
Freeport, New York 11520

TO:

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Plaintiff
140 Broadway
New York, New York 10005

Notice to Produce.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff, 74 Civ. No. 1450

-against-

IRENE SOLOMON and LOUIS SCHUSTER, as
Trustee of the S & L Pension Trust -
R.T.B. Industries, Inc.,

NOTICE TO PRODUCE

Request for production of
documents

Defendants.

S I R S :

The defendants herein, by their attorneys, RIVKIN, LEFF & SHERMAN, ESQS., hereby request that pursuant to Rule 34 of the Federal Rules of Civil Procedure, the plaintiff herein produce the following documents and matters at the office of RIVKIN, LEFF & SHERMAN, ESQS., 55 North Ocean Avenue, Freeport, New York, within thirty (30) days of the service herein:

1. All reports and/or memoranda and/or writings and documents of any nature from any and all physicians conducting physical examinations upon HERBERT SOLOMON for the policy mentioned herein and for any other policy and/or application made by the said HERBERT SOLOMON. This request to produce is intended to include but not be limited to any and all oral conversations between any of such physicians and the plaintiff, which were thereafter reduced to writing in memoranda form in any kind or nature.
2. All policies of insurance issued at any time, where the insured life in the policies issued had a history of Arteriosclerotic

Notice to Produce.

Heart Disease and where the insured life in the policies issued had a history of ulcers:

- a- On all such above mentioned policies of insurance submit the applications, the physician examinations therefor;
- b- State whether such policies of insurance were "rated" or not and if so, the rate applied thereto;
- c- On any of the foregoing policies issued by the plaintiff, set forth all intra-company memorandums pertaining to said application and/or policy.

3. All documents and/or memoranda of any kind or nature of the plaintiff issued to any of the agents and/or agencies pertaining in any manner, shape or form to the insurance and/or acceptance of applications for insurance that might in any way pertain to Arteriosclerotic Heart Disease or history of ulcers.

4. All intra-company documents and/or memoranda of any kind or nature referring in any manner, shape or form to Arteriosclerotic Heart Disease or history of ulcers.

5. State the name and/or names of the person or persons in charge of or who has the responsibility of approving or otherwise the issuance of policies of insurance with either Arteriosclerotic Heart Disease or history of ulcers for the years 1972 and 1973.

6. Set forth any and all documents and including exact copies of applications for life insurance for any and all policies on the life of HERBERT SOLOMON.

7. Set forth any and all rules, regulations, request orders and specifications for examining physicians examining for this

Notice to Produce.

plaintiff on life insurance applications..

8. All memoranda directed to any and all examining physicians for plaintiff covering any portion of the subject of Arteriosclerotic Heart Disease and history of ulcers.

9. Any contract or agreement of any kind, including any memoranda pertaining thereto between plaintiff and Irving R. Aaronson and/or John A. Newman Agency.

10. Any personal files including any memoranda contained therein but not limited to authority of Irving R. Aaronson and John A. Newman Agency.

11. Set forth any and all copies of investigation pertaining to HERBERT SOLOMON covering any and all policies or application of policies made to this plaintiff.

12. Set forth any rate schedule for policies that would or could have been issued with Arteriosclerotic Heart Disease and history of ulcers.

13. Any and all documents, memoranda or otherwise from the medical department of the plaintiff in any way associated with Arteriosclerotic Heart Disease and history of ulcers.

14. All advertisement for life insurance or brochures pertaining to same issued and/or promulgated by the plaintiff for the past ten (10) years.

15. All papers, presentations and/or minutes of any meeting of the plaintiff prepared for any intra-company group or other meeting either intra-company or without the company, pertaining to the sale of life insurance policies for the past five (5) years.

Notice to Produce.

16. Set forth any application for insurance which have been rejected within the past five (5) years due to Arteriosclerotic Heart Disease.

17. Set forth any application for insurance which have been rejected within the past five (5) years due to a history of ulcers.

18. Set forth any investigation, personal or otherwise, of HERBERT SOLOMON, at any time before or since his demise.

19. All records of any kind or nature pertaining to any and all policies other than the one at issue herein with the plaintiff covering the life of HERBERT SOLOMON.

20. All memorandums, intra-company or otherwise, including papers, presentations and the like, presented by the various chief medical examiners of the company who have been in such position from 1970 to date.

Dated: Freeport, New York
February 18, 1975

Yours, etc.,

RIVKIN, LEFF & SHERMAN

BY:

LEONARD L. RIVKIN
Attorneys for Defendants
Office and P. O. Address
55 North Ocean Avenue
Freeport, New York 11520

TO:

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Plaintiff
140 Broadway
New York, New York 10005

First Set of Interrogatories.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff,

74 Civ No. 1450

-against-

FIRST SET OF INTERROGATORIES

IRENE SOLOMON and LOUIS SCHUSTER,
as Trustee of the S & L Pension
Trust - R.T.B. Industries, Inc.,

Defendants.

S I R S :

Defendants by their attorneys, RIVKIN, LEFF & SHERMAN, ESQS.,
hereby propound the following Interrogatories to be answered in
writing by the plaintiff, pursuant to Rule 26 and 33 of the Federal
Rules of Civil Procedure, said answers to be provided in writing
and under oath, on or before thirty (30) days from the service
hereof.

INSTRUCTIONS:

(a) These interrogatories are intended to be continuing in
nature and requiring the filing of supplemental answers setting
forth any information which may be acquired by you, your agents,
attorneys or representatives affecting the accuracy or completeness
of the answers originally provided.

(b) Unless otherwise specified, the information requested
herein refers to the period from 1971 to the date of receipt of
these interrogatories.

Interrogatories.

(c) If objection is made to any of the following interrogatories or if an interrogatory is otherwise not answered in full, state the specific grounds therefor and answer such interrogatories to the extent to which there is no objection. If privilege is alleged as to any information or documents requested, fully identify the information or documents for which privilege is asserted, stating the grounds for each such privilege asserted.

DEFINITIONS:

For the purpose of these Interrogatories, the following term shall be defined as follows wherever used herein unless the context otherwise indicates:

(a) "RATING" shall mean an increased premium over and above the usual and ordinary premium paid by assured with no history of medical or the like problem.

1. Was Irving R. Aaronson an agent of the plaintiff at the time the first application of the policy at issue herein was received? If not, state the exact relationship.

2. Did Irving R. Aaronson collect the first premium under the policy herein? If not, who did?

3. Does plaintiff contend that the policy herein was a rated policy? If so, set forth the details pertaining to same.

4. Does plaintiff allege that it relied in any manner, shape or form on the physical examination it conducted herein? If so, the full context and the nature on which it relied on said physical.

Interrogatories.

5. Set forth the percentage of time the plaintiff has conducted two physicals for applications for life insurance as compared to the amount of policies issued.

6. If there is any company rule or procedure regarding rating, please set forth the details thereof.

7. Set forth the exact date plaintiff first learned of HERBERT SOLOMON's Arteriosclerotic Heart Disease and how and in what manner same was discovered.

8. Set forth the exact date plaintiff first learned of HERBERT SOLOMON's history of ulcers and how and in what manner same was discovered.

9. When did the plaintiff first have reason to believe HERBERT SOLOMON had suffered from Arteriosclerotic Heart Disease?

10. When did the plaintiff first have reason to believe HERBERT SOLOMON had suffered from a history of ulcers?

11. What precipitated the investigation, which ultimately indicated HERBERT SOLOMON had suffered from Arteriosclerotic Heart Disease?

12. What precipitated the investigation, which ultimately indicated HERBERT SOLOMON had suffered from a history of ulcers?

13. Did the plaintiff back date the policy herein at issue?

14. Was the premium of \$12,204.11 a standard one year premium for the amount of insurance afforded for the life of a person without any disability of any kind or nature of the age of HERBERT SOLOMON at the time said policy was issued?

Interrogatories.

15. When the policy was allegedly issued in March of 1973 to be effective as of November 1972, was there any reduction in the premium for the period of November 1972 to November 1973? If not, why not?

16. When the policy was allegedly issued in March of 1973 to be effective as of November, 1972, was there any reduction in the premium for the period of November 1972 to November 1973 due to the fact that all parties had full and complete knowledge of the fact that HERBERT SOLOMON in fact was alive from November 1972 to March 1973.

17. Was the policy issued subsequent to an investigation of HERBERT SOLOMON of any kind or nature other than the physical examinations referred to herein? If so, how long after the investigation was it issued? Set forth the date of each and every investigation. Who conducted them? What period they encompassed and what the result thereof was?

18. Did the premium of this policy at issue cover the period from November 1972 to November 1973?

19. Had you ever written any other life insurance policy for the life of HERBERT SOLOMON? If so, when, the amount and were they rated or non-rated?

20. What were the reasons which plaintiff will allege resulted in two physical examinations of this plaintiff on this application rather than one? Set forth the names and addresses of all examining physicians and the names of all applicants previously examined by these physicians for the five (5) years preceding the

Interrogatories.

date of the examination of HERBERT SOLOMON. Set forth whether any of the applications who had been heretofore examined by any of the two aforementioned physicians were ever turned down for life insurance.

21. Who selected the physicians who examined HERBERT SOLOMON for the application?

22. Set forth the names and addresses of all other doctors conducting physical examinations for the plaintiff in the New York City and Long Island area at or about the time of the initial application signed by HERBERT SOLOMON herein?

23. Was John A. Newman Agency an agent in 1972?

24. Was John A. Newman Agency an agent in 1973?

25. Did John A. Newman Agency have the right to appoint sub-agents in 1972?

26. Did John A. Newman Agency have the right to appoint sub-agents in 1973?

27. Was Irving R. Aaronson an agent of the plaintiff in 1972?

28. Was Irving R. Aaronson an agent of the plaintiff in 1973?

29. Was Irving R. Aaronson an agent of John A. Newman in 1972?

30. Was Irving R. Aaronson an agent of John A. Newman in 1973?

31. Was Irving R. Aaronson an agent of John A. Newman at the time the application for the instant policy was executed?

32. Was John A. Newman an agent of the plaintiff in 1972?

33. Was John A. Newman an agent of the plaintiff in 1973?

Interrogatories.

34. Has the plaintiff ever issued a policy of like insurance to a person in age bracket, i.e., within two (2) years either way, with Arteriosclerotic Heart Disease?

35. Has the plaintiff ever issued a policy of like insurance to a person in age bracket, i.e., within two (2) years either way with a history of ulcers?

36. Has plaintiff ever issued a rated policy for Arteriosclerotic Heart Disease?

37. Has plaintiff ever issued a rated policy with a history of ulcers?

38. Set forth who collected the initial premium on the application of HERBERT SOLOMON for the policy herein.

39. State in detail what plaintiff contends his practice is with respect to acceptance or rejection for risks of life insurance with regard to Arteriosclerotic Heart Disease and a history of ulcers and both from 1971 to date.

40. If this practice in "39" incorporates rating of policies, set forth the details regarding the calculation of the rating.

These interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorney obtained further information between the time answers are served and at the time of the trial herein.

Dated: Freeport, New York
February 18, 1975

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Interrogatories.

Yours, etc.,

RIVKIN, LEFF & SHERMAN

BY:

LEONARD L. RIVKIN
Attorneys for Defendants
Office and P. O. Address
55 North Ocean Avenue
Freeport, New York 11520

TO:

LEBOLUF, LAMB, LEIBY & MacRAE
Attorneys for Plaintiff
140 Broadway
New York, New York 10005

**Affidavit of Irene Solomon, in Opposition to Motion
for Summary Judgment.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff,

against

IRENE SOLOMON and LOUIS SCHUSTER & S Trustee of the
S & L Pension Trust-R.T.B. Industries, Inc.,
Defendants.

STATE OF NEW YORK } ss.:
COUNTY OF NASSAU }

IRENE SOLOMON, being duly sworn, deposes and says:

I am one of the named defendants in this action and am the widow of Herbert Solomon, and the principal beneficiary named in the contract of life insurance issued by the National Life Insurance Company on my late husband's life.

I submit this affidavit in opposition to the plaintiff insurance company's motion for summary judgment. I am informed by my attorneys that the plaintiff insurance company, by its attorneys, claim that there are no material issues of fact in this law suit. I know of my own personal knowledge, of substantial questions and issues of fact and respectfully state that I should not be deprived of proving these facts on trial here or permitting my attorneys to cross examine the plaintiff's witnesses, on their sworn statements and the records.

I know that Irving R. Aaronson, the agent of the National Life Insurance Company, who procured the application for life insurance for my husband, knew of the various angina pains that my husband complained of and also knew

Affidavit of Irene Solomon.

of the hospitalization of three days in Doctors' Hospital. On at least one or more than one occasion, my husband advised me, in substance, that Mr. Aaronson was told of the electrocardiogram test taken of my husband and the fact that it was normal in all respects. Mr. Aaronson was also told in substance, that my husband was advised that he could return to all normal activities.

Mr. Aaronson, the National Life Insurance Company agent, said in substance to my husband, "Forget it," or "Don't worry about it" in relation to his application and his medical treatment.

There was one conversation that is particularly fresh in my mind. This occurred in 1973 when Mr. Aaronson and my husband discussed a gift of three suits of clothing in consequence of my husband having used Mr. Aaronson's services as an agent of the National Life Insurance Company to procure life insurance. At that time, I recall, our conversation included the fact that Mr. Aaronson was aware of my husband's medical treatment and complaints.

My husband and I believed that Irving R. Aaronson was acting at all times with full authority as an agent for National Life Insurance Company.

I also wish to state that my husband's death came about as a result of a homicide and was not related to any medical condition whatsoever.

IRENE SOLOMON

Sworn to before me this
day of 1975.

LEONARD LAMBERT RIVKIN
Notary Public,
State of New York.
No. 30-8589450.
Qualified in Nassau County.
Term Expires March 30, 1975.

**Affidavit of John F. Morrison in Opposition to Motion
for Summary Judgment.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff,

against

IRENE SOLOMON and LOUIS SCHUSTER as Trustee of the
S & L Pension Trust-R.T.B. Industries, Inc.,

Defendants.

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOHN F. MORRISON, being duly sworn, deposes and says:

That he is an attorney associated with Rivkin, Leff & Sherman, Esqs., attorneys for the defendants, and as such, is fully familiar with the facts and circumstances of the within matter as hereinafter set forth.

This affidavit is submitted in opposition to the plaintiff, National Life Insurance Company's motion for summary judgment. This affidavit is supplemented by the annexed Memorandum of Law, submitted on behalf of the above named defendants.

It is respectfully submitted that the affidavit of Irene Solomon, on its face, raises a substantial and material issue of fact, precluding the granting of summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Under the substantive law of New York, applicable here,

Affidavit of John F. Morrison.

the statute governing representations by the insured is Section 149 of the Insurance Law (McKinney's Cons. Laws, Vol. 27). This section requires that in order for an insurer to avoid a contract of insurance, any misrepresentations in the application be material. In determining materiality, the insurer's practices in accepting or denying similar risks is admissible. Here, Mrs. Solomon's affidavit attests to the fact that Irving R. Aaronson, an agent or sub-agent of the plaintiff, National Life Insurance Company ("the Company") knew at all times relevant here of the facts and circumstances surrounding Herbert Solomon's medical treatments and complaints.

There is case law in New York, found in defendants' annexed Memorandum of Law, which holds that such notice to the agent is notice to the Company and establishes an estoppel when the Company issues the policy with such knowledge.

The defendants have raised estoppel by the agent's knowledge in their answer, as well as estoppel on other grounds, including the acceptance of other similar risks by the Company.

On the latter point, it is respectfully stated that the Court should take notice that issue has only been joined in this action since February 18, 1975. No disclosure or discovery, quite obviously, has gone forward here. The defendants believe that the lack of supporting documentary evidence to support the Company's contention that it would not insure this risk had it known of the alleged misrepresentations is very significant. The Company submits a bare affidavit of its medical director, nothing more on this point. Defendants should be allowed, by appropriate discovery devices, to impeach that contention by a showing that the risk insured herein, the life of Herbert Solomon, was not

Affidavit of John F. Morrison.

an acceptable risk according to the plaintiff Company's own prior policies and practice.

Additionally, the Company's affidavits pass over quickly a potentially significant point. The Company admits that its policy of life insurance issued to Herbert Solomon in May, 1973, was backdated to November of 1972. The premium paid by Mr. Solomon was \$12,204.11. There arises therefore questions of material fact as to this Company's rating policy, and whether the Company charged the insured a fair amount for six months of insurance coverage. If the amount of the premium is based upon a "rated" (i.e., an increased risk) policy, then there is an inference that the underwriting department of the Company knew of Herbert Solomon's medical treatment when the policy was issued.

Further, the defendants should be permitted by proper discovery devices to impeach or contradict the assertions that Herbert Solomon suffered from arteriosclerotic heart disease and ulcers. Even assuming, arguendo, that he did, the defendants should be allowed to show that the Company assumed similar risks on rated policies.

The defendants have also counterclaimed herein for the proceeds of the policy. Such counterclaim is directly involved in this motion, since it relates to the same facts and circumstances giving rise to the summary judgment sought by the plaintiff company. The defendants should not, at this point, before any discovery and/or disclosure has gone forward, be thrust out of Court and be deprived of an opportunity to contradict the plaintiff Company's position. This is particularly true, it is respectfully stated, when the evidence to contradict the Company's position is solely within the possession of the Company.

For these reasons, as above stated, the plaintiff's motion for summary judgment should be denied in its entirety

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Affidavit of John F. Morrison.

or, at the very least, denied with leave to renew after full disclosure and discovery has gone forward herein.

JOHN F. MORRISON

Sworn to before me this
28th day of February, 1975.

LEONORA NATALE
Notary Public,
State of New York
No. 52-4513295
Suffolk County
Term Expires March 30, 1975

Defendant's Statement Pursuant to Rule 9(g).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 Civ. No. 1450

STATEMENT PURSUANT TO GENERAL RULE 9(g) OF THE
GENERAL RULES OF THE COURT.

NATIONAL LIFE INSURANCE COMPANY,
Plaintiff,
against

IRENE SOLOMON and LOUIS SCHUSTER as Trustee of the
S & L Pension Trust-R.T.B. Industries, Inc.,
Defendants.

The defendants contend that there are substantial material issues of fact, as well as a counterclaim herein, which preclude the granting of summary judgment, as follows:

1. An agent or sub-agent of National Life Insurance Company knew at all times relevant herein of the medical treatment of Herbert Solomon and of those tests mentioned in the physicians' affidavits and that such knowledge is imputable to the plaintiff company. Further, this agent or sub-agent informed the decedent, Herbert Solomon, in substance, that he need not worry about any problems involving the application for life insurance.
2. The amended application submitted by Herbert Solomon put the National Life Insurance Company on notice concerning the electrocardiogram of Dr. Friedman.

Defendant's Statement Pursuant to Rule 9(g).

3. The plaintiff company backdated the policy in such a manner that they charged Herbert Solomon for a period when there was no risk, thus raising the issue of whether or not this was a rated policy and whether a premium of \$12,204.11 was a fair amount for six months of insurance on this risk.

4. The plaintiff company has failed to buttress its contention, by proper documentary proof, that they have never issued policies on similar risks involving similar medical treatment. Further, the proof and documentation which would make possible the cross examination or impeachment of the plaintiff's medical director's affidavit is solely within the control of the moving party and defendants should be permitted at the very least to proceed with disclosure and discovery in the matter at bar.

5. The defendants have interposed a counterclaim for the proceeds of the policy which of itself must deny summary judgment, for all of the allegations in the counterclaim are regarded as true in motions addressed to pleadings. Defendants deny there were any material misrepresentations.

Yours, etc.,

RIVKIN, LEFF & SHERMAN, Esqs.
By s/s LEONARD L. RIVKIN
Leonard L. Rivkin
Attorneys for defendants
Office & P. O. Address
55 North Ocean Avenue
Freeport, New York

516—378-4554

Stipulation Extending Time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

NATIONAL LIFE INSURANCE COMPANY,	:	
Plaintiff,	:	74 Civ. No. 1450
v.	:	<u>STIPULATION EXTENDING TIME</u>
IRENE SOLOMON and LOUIS SCHUSTER as Trustee of the S&L Pension Trust-R.T.B. Industries, Inc.	:	
Defendants.	:	

----- x

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties hereto, that the time within which plaintiff NATIONAL LIFE INSURANCE COMPANY may reply, move or otherwise plead with respect to the defendants' counterclaim herein, as well as the time within which said plaintiff may respond or object to defendants' Interrogatories, Notice To Produce and Notice To Admit, herein be, and the same hereby is, extended until

Stipulation Extending Time

20 days after the entry of an order with respect to plaintiff's motion for summary judgment.

LeBOEUF, LAMB, LEIBY & MacRAE

By Alvin K. Blitzen
(A Member)

Dated: New York, New York Attorneys for Plaintiff
March , 1975 National Life Insurance Company
140 Broadway
New York, New York 10005
(212) 269-1100

SO ORDERED:

RIVKIN, LEFF & SHERMAN

U.S.D.J.

By /S/
(A Member)

Attorneys for Defendants
Irene Solomon and Louis Schuster
as Trustee of the S&L Pension
Trust-R.T.B. Industries, Inc.
55 North Ocean Avenue
Freeport, New York 11520
(516) 378-4554

Supplemental Affidavit of Rowland Ricketts, Jr.
in Support of Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
NATIONAL LIFE INSURANCE COMPANY, :
Plaintiff, : 74 Civ. No. 1450

v. : SUPPLEMENTAL AFFIDAVIT
IRENE SOLOMON and LOUIS SCHUSTER : IN SUPPORT OF PLAINTIFF'S
as Trustee of the S&L Pension : MOTION FOR SUMMARY
Trust-R.T.B. Industries, Inc. : JUDGMENT

Defendants. :
----- x

STATE OF VERMONT)
: ss.:
COUNTY OF WASHINGTON)

Rowland Ricketts, Jr., being duly sworn, deposes and
says:

1. I am the Assistant Director of Underwriting of the National Life Insurance Company, the above named plaintiff, and I have held this position or the position of Senior Underwriter for more than three years, including all of the times mentioned herein.

2. I make this affidavit on the basis of personal knowledge and records currently in the possession of National Life Insurance Company, which are maintained by said Company in the ordinary course of its business.

3. My duty as Assistant Director of Underwriting is to examine applications for life and disability insurance, and to decide on the basis of the information in completed

Affidavit of Rowland Ricketts Jr.

applications, and upon the advice of a Medical Director of National Life Insurance Company, whether or not to enter into contracts of life and disability insurance.

4. On or about May 25, 1973, I examined the application of Herbert Solomon, of 2815 Shore Road, Merrick, New York, for a life insurance policy in the amount of \$240,792.

5. A copy of Part A of the Application to National Life Insurance Company signed by Herbert Solomon on March 20, 1973, is attached hereto and made a part of this affidavit.

6. Part A of said application constitutes a part of the contract of insurance issued upon the life of Herbert Solomon, bearing policy number 1462937, and it was attached to said policy when the policy was issued.

Part A states in part that,

"The agent taking this application has no authority to make, modify, alter or discharge any contract hereby applied for, nor to extend credit on behalf of the Company. No statement made to or information acquired by any representative of the Company shall bind the Company unless set out in writing in parts A or B of this application."

7. As a result of the foregoing, Herbert Solomon was on notice that the agent taking his application had no authority to make, modify, alter or discharge the contract

Affidavit of Rowland Ricketts, Jr.

applied for, and that no statements made or information acquired by this agent or by any representative of National Life Insurance Company would bind the Company unless such statements or information were set out in writing in parts A or B of the application.

18 Rowland Ricketts, Jr
Rowland Ricketts, Jr.

Sworn to before me this
28th day of March, 1975.
February

ISACAN CHEEVER
Notary Public

Exhibit, Annexed to Supplemental Affidavit of Rowland Ricketts, Jr.

NO 139145

Application to NATIONAL LIFE INSURANCE COMPANY

Montpelier, Vermont

Policy No. 1162137

NEWMAN

Agency

QUESTIONS 1-15 REFERRED TO PROPOSED INSURED

PRINT NAMES except signatures

1. Full name	ROWLAND R. SOLOMON	2. Date of birth	6-23-18	3. Male <input checked="" type="checkbox"/> Female <input type="checkbox"/>	4. Place of birth	New York	5. Single <input type="checkbox"/> Married <input checked="" type="checkbox"/>	6. Age Policy at Age	54	7. Widowed <input type="checkbox"/> Divorced <input type="checkbox"/>
7. Occupation	A. Land or business [Truck Body Building & Repairs B. Specific duties Executive C. Employer R.T.B. Industries Inc.									
8. Any change contemplated? If "Yes," explain under Remarks	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>									
9. Do you intend to travel or reside outside U.S.A.?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes," complete International Travel questionnaire, No. 1480									
10. Have you ever applied for insurance or reinstatement which was declined, postponed or modified in any way?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes," give details under Remarks									
11. Are other negotiations for insurance pending?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes," give company, amount and reason under Remarks									
12. Has there been or will there be any termination or reduction of premiums, any surrender, any reduction in amount or period of coverage, or any substantial borrowing on any insurance on your life, if the insurance herein applied for is issued?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes," give company, amount and reason under Remarks									
13. Have you ever been or do you have any intention of becoming a pilot or crew member of any type of aircraft?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes," complete Aviation questionnaire No. 1487									
14. Are you or do you have any intention of becoming a member of a military organization?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes," give details under Remarks									
15. Have you within the past two years participated in, or do you intend to participate in, any motor powered racing, scuba, skin or sky diving, rodeos or any other hazardous avocation?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes," submit avocation questionnaire No. 1390									
16. Have you had your motor vehicle driving license suspended or revoked during the last two years?	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes," give details under Remarks									
17. Total insurance in force \$ 179,708	Company	Amount	Year	Issued	Total with Waiver of Premium \$					
Metropolitan	75000				Total Monthly Disability Income \$					
Rudeential	5000				Total Accidental Death Benefit \$					
Quitable	10000									
Retational	134108									
7. Home Office corrections or amendments										

18. Plan of insurance

Term

19. Amount of insurance

\$ 240,792

20. Additional benefits desired

Waiver of Premium and Endowment for Years
Level Term Rider \$ _____
Reducing Term Rider \$ _____
Family Income Rider \$ _____ per Mo. for Years
Additional Insurance Option for \$ _____
Family Protection Benefits (Complete Form 1440)
Cost of Living Rider No. of Units _____

21. Basis of premium payment

Annual Semiannual Quarterly Monthly

22. \$ has been paid to agent as first premium

23. Use of dividends: Pay in cash Apply to premiums
Hold at interest
Purchase paid-up additions with Dividend Term Option

24. Is automatic payment of premium desired, if available? Yes No

25. Beneficiary Give relationships and full names

Irene Solomon, wife, if living;

otherwise the executors or administrators of Insured
The right to change the beneficiary is reserved.

26. Owner Trustees of S. & L. Pension Trust
R.T.B. Industries Inc.

Social Security No. of Owner

If owner is a minor, complete Form No. 1481

27. Endowment payee or Retirement payee, if applicable:
Insured, his executors or administrators Owner As per supplementary request

28. To whom shall premium notices AND ALL CORRESPONDENCE be sent? Insured Owner Applicant Other
Give Street & No., City, State & Zip Code

191 Cabot St., West Babylon, N.Y.

29. Additional directions and remarks

Date policy November 30, 1972

All payments to be protected by the Spendthrift provision

Exhibit.

(1) The foregoing statements and answers are, to the best knowledge and belief of the proposed insured, complete and true and together with the statements and answers contained in this application shall constitute a part of the contract of insurance if the same be issued. The applicant, if someone other than the proposed insured, agrees to be bound by all statements and answers signed by the proposed insured in parts A and B of this application. (2) The agent taking this application is hereby authorized to modify, alter or discharge any contract he may be liable for, not to extend credit on behalf of the Company. No statement made to him or his agents or to any representative of the Company shall bind the Company unless set out in writing in parts A or B of this application. (3) The Company, its agents, or any representative of the Company shall bind the Company unless such policy is delivered to the owner and the first premium paid by the insured. (4) Under any policy issued pursuant to this application unless and until such policy is delivered to the owner and the first premium paid by the insured, the liability of the insured, except as may be otherwise provided in any conditional receipt issued, which bears the same number as the policy. (5) A change of any policy issued on this application will be a ratification of any correction or amendment to the application noted by the Company in the Home Office corrections or amendments, and a copy of the amended application attached to the policy will be sufficient notice of change - except where the laws of the state or other jurisdiction in which the application is made require written ratification, no change shall be made in the conditions of the plan of insurance or benefits unless agreed to in writing.

Executed at Wardwaylon, N.Y.

Ward 20

1973

Proposed Insured

Albert S. Lom
Trustees of S. & L. Pension Trust -
R.T.S. Industries Inc.

John C. Miller

Supplemental Affidavit of Charles P. Sifton in Support
of Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL LIFE INSURANCE COMPANY, :

Plaintiff, : 74 Civ. No. 1450

- against - : SUPPLEMENTAL AFFIDAVIT
IRENE SOLOMON and LOUIS SCHUSTER : IN SUPPORT OF PLAINTIFF'S
as Trustee of the S & L Pension : MOTION FOR SUMMARY
Trust-R.T.B. Industries, Inc., : JUDGMENT

Defendants. :

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CHARLES P. SIFTON, being duly sworn, deposes and
says:

1. I am a member of LeBoeuf, Lamb, Leiby & MacRae,
the firm of attorneys representing plaintiff National Life
Insurance Company in this proceeding. I make this affidavit
on the basis of personal knowledge in response to the allega-
tions contained in the answering affidavit of defendant Irene
Solomon with regard to what Irving R. Aaronson allegedly
knew and said concerning her husband's heart condition.

2. I received the answering affidavits, including
Mrs. Solomon's, one day prior to the hearing on this motion.
Since Irving R. Aaronson is at present neither an agent nor
employee of plaintiff and is represented by separate counsel,

Affidavit of Charles P. Sifton.

an affidavit from Mr. Aaronson responding to the particular allegations made by defendant Irene Solomon is not available to me on such short notice. I have, however, discussed the subject raised by defendant Irene Solomon's affidavit with Mr. Aaronson on the 'phone and he has stated to me unequivocally that he did not know of the insured's heart condition or of his hospitalization at any time prior to his death and never excused him in words or substance from making complete disclosure in his application for insurance.

3. However, by reason of the facts set forth in the supplemental affidavit of Rowland Ricketts, Jr., obtained in advance of the receipt of defendants' answering papers and submitted herewith, and by reason of the law set forth in the accompanying Memorandum of Law, testimony from Irving R. Aaronson setting forth what he knew or said concerning the insured's heart condition is entirely irrelevant to the issues raised by plaintiff's motion. As set forth in Mr. Ricketts' supplemental affidavit, the policy sold to the insured contained language explicitly notifying him that Mr. Aaronson could not waive the requirements of full disclosure set forth in the application and that disclosures to Mr. Aaronson in no way excused less than full disclosure to the insurance company. As the cases set forth in the accompanying Memorandum of Law make clear, these circumstances make it unnecessary for this Court to determine whether Mr. Aaronson or Mrs. Solomon is telling the truth.

Affidavit of Charles P. Sifton.

4. Nevertheless, in the event that the Court finds that the facts to which Mr. Aaronson would testify as set forth herein are essential to the resolution of the issues raised by plaintiff's motion, I respectfully request the Court for a continuance to obtain, by affidavit or deposition, Mr. Aaronson's testimony.

5. I have also, by reason of the late receipt of defendants' affidavits, been unable to obtain in time for this hearing an additional affidavit from my client, which is located in Montpelier, Vermont, with regard to the speculation raised in the affidavit of defendants' attorney that since the policy is acknowledged to have been backdated (at the insured's request and for his benefit), it is possible that an excess premium was collected by the insurance company from which the attorney then infers that the insurance company may have actually known of the insured's heart condition.

6. Again, I have discussed this issue with my client on the 'phone and been advised that an affidavit may be obtained to show on the basis of the Company's records that no excess premium was charged, that the first premium was collected at the date of actual issuance in June and the second would have been collected on the following June anniversary rather than on the anniversary of the imputed November issuance date. Should this Court decide that these facts are essential to the determination of issues raised by plaintiff's motion, I again ask for a continuance to allow plaintiff time

Affidavit of Charles P. Sifton.

to secure an affidavit attesting to them. However, since the question of whether an excess premium was charged appears to be nothing more than attenuated speculation on the part of defendants' attorney, I respectfully submit that this Court should not require such an affidavit in order to grant plaintiff's motion for summary judgment.

Isi Charles P. Sifton

CHARLES P. SIFTON

Sworn to before me this

4th day of March, 1975.

Isi Carol Wagner

Notary Public

CAROL WAGNER
Notary Public, State of New York
Reg. No. 120775
Clerk, Bronx County
Certified Notary in New York County
Commissioned March 30, 1975

Supplemental Affidavit of John F. Morrison in Opposition
to Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
NATIONAL LIFE INSURANCE COMPANY,

Plaintiff,

-vs-

IRENE SOLOMON and LOUIS SCHUSTER, as

Supplemental Affidavit In
Opposition to Plaintiff's
Motion for Summary
Judgment

Trustee of the S&L Pension Trust - R.T.B.
Defendants.
Industries, Inc. -----x

STATE OF NEW YORK) ss:
COUNTY OF NASSAU)

JOHN F. MORRISON, being duly sworn, deposes and
says:

That I am an attorney associated with the firm of
RIVKIN, LEFF & SHERMAN, ESQS., attorneys for the defendants in this
action.

1. I am fully familiar with the facts and circumstances
of the within action and submit this affidavit in reply to the supplemental
affidavits submitted by the plaintiff, NATIONAL LIFE INSURANCE COMPANY,
by its Assistant Director of Underwriting, and its attorney.

2. The supplemental affidavits of ROWLAND
RICKETTS, JR. and the attorney for the plaintiff do not in any way attempt
to deal with the issue of the plaintiff company having been put on notice by

Affidavit of John F. Morrison.

Doctor Friedman's report to them in April of 1973, which report clearly indicated that the decedent, HERBERT SOLOMON, had undergone an electrocardiogram test. As indicated in the annexed Memorandum of Law, New York Case Law has held that when a life insurance company has constructive or actual notice of its insured's medical condition and history, or is presented with such evidence that would raise the suspicions of an ordinarily prudent person and sits back and does not investigate, then the company has waived its right to rescind the policy. It is uncontested by any of the plaintiff's affidavits and alleged "proof" that the policy of life insurance issued on the life of HERBERT SOLOMON was issued in May, 1973, and that Doctor Friedman's report was received more than one month prior thereto.

3. Therefore, the defendant must ask the following questions: Are the beneficiaries and owners of a life insurance policy to be bound by a life insurance company's lack of investigation? ; May a company who had every opportunity to procure a full and complete report and to contact the personal physician of the decedent, thereafter come into Court and seek to rescind the policy? ; May a life insurance company by submitting **answering affidavits** by their Assistant Directors and Medical Directors, without a shred of supporting documentary evidence regarding the company's insuring practices, obtain summary judgment against the beneficiaries and owners of the policy?

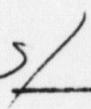
4. It is respectfully submitted that inasmuch as the plaintiff company wishes to avoid answering the aforementioned questions or to provide any substantive proof on these questions, that summary judgment cannot therefore be granted. The Company also relies upon the argument that

Affidavit of John F. Morrison.

the application contained certain language regarding the agent's authority or lack of authority. No proof has been adduced that the decedent, HERBERT SOLOMON, actually had read the application or had any knowledge regarding the agent, Irving R. Aaronson's authority or lack of authority. Therefore, other questions arise. Is the insured and these defendants to be bound by language contained in an application which is found in print that is infinitesimally small and almost illegible? Are the defendants bound by plaintiff's assertion that the application was annexed to and made part of the policy without proof that it, in fact, was annexed?

5. Moreover, in their Supplemental Affidavits the plaintiff's attorney takes the position that the decision on this motion may be postponed ad infinitum. In effect, they are asking for an opportunity to try the case without the benefit of cross-examination being available to the defendants. It is respectfully submitted that when a party who has brought on a motion for summary judgment must request a continuance to supply alleged evidence, then, in reality, the matter at bar is not a proper case for summary judgment and it becomes quite evident that there are material questions of fact which require a trial.

Sworn to before me this
10th day of March 1975.



JOHN F. MORRISON

**Order dated March 31, 1975 granting
plaintiff's motion.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 74 C 1450
March 31, 1975

NATIONAL LIFE INSURANCE COMPANY, Plaintiff,
against

IRENE SOLOMON and LOUIS SCHUSTER, as Trustee of the
S & L Pension Trust-R.T.B. Industries, Inc.,
Defendants.

Appearances:

LEBOEUF, LAMB, LEIBY & MACRAE, Esqs.
Attorneys for Plaintiff

ALLAN BAKST, Esq.
RIVKIN, LEFF & SHERMAN, Esqs.
Attorneys for Defendants

BRUCHHAUS^{EN}, D. J.

The plaintiff, National Life Insurance Company, moves for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in its favor for relief demanded in the amended complaint.

The complaint seeks to rescind the policy of life insurance, issued on the life of Herbert Solomon, deceased, because of misrepresentations made on the application concerning his medical history.

Order dated March 31, 1975 granting plaintiff's motion.

The facts disclose the following: that on March 20, 1973, the decedent applied to the plaintiff for a life policy in the amount of \$240,792.00. Thereafter, on March 27, 1973, William J. Godfrey, M.D. and Nicholas Kuzmowycz, M.D. examined the applicant on behalf of the insured, and asked various questions of the proposed insured concerning his past medical history. Their affidavits, sworn to on February 12, 1975, state that in a response to the question concerning heart disorder or any other indication of heart disorder, the applicant answered in the negative which answer was recorded on Part B of the application and both applicant and doctors signed the said application. The completed forms are attached to each affidavit of the examining doctor.

Thereafter the application was reviewed by Brian McCracken, M.D. a medical director of the plaintiff. His primary duty is to evaluate the medical aspects of any applicant and upon reviewing the completed application, to either recommend approval or disapproval of the risk to the underwriting department of the insurer. In the case at bar, the application was approved. Thereafter information was brought to his attention that the decedent was suffering from recurring chest pains, and was under medical care for the past 15 years. Said patient was diagnosed as arteriosclerotic heart disease with angina pectoris class II-B. If this information was presented to him, said doctor would have disapproved the risk. This disorder is a hardening and thickening of artery walls, accompanied by a loss of elasticity, which results in a reduction of the nourishment which goes to the heart. Angina pectoris is chest pain resulting from an increased demand by the heart. Class II-B means, the patient need not restrict his normal daily activity.

Rowland Ricketts, Jr., the Assistant Director of Underwriting of the insurer, states in substance that he deter-

Order dated March 31, 1975 granting plaintiff's motion.

inines whether or not a policy of insurance shall issue. This decision rests upon the completed application together with the advice of the medical director of the insurer. If he had known the true medical background of this applicant, he would not have issued said policy.

Immediately prior to the issuance of the policy, standard investigation disclosed that Karl Friedman, M.D. was the applicant's family physician. Thereupon the insurer requested the applicant to sign a Request for Amendment of the Application before the policy was delivered, to reflect the visits to Dr. Friedman. In response to the question of medical care for the past 5 years by Dr. Friedman, he responded that he visited him for check-ups and minor complaints from 1961-1972, the results of which were normal.

The affidavit of Karl Friedman, M.D. states that he examined the applicant from October 31, 1957 to May 8, 1972. The complaints of the applicant consisted mainly of recurring chest pains, that chest X-rays and electrocardiogram examinations were performed on Mr. Solomon. The applicant informed his doctor that he was admitted to Doctor's Hospital, Freeport, on November 29, 1972 and discharged on December 3, 1972. He was under the care of Dr. Ruskin and Dr. Braverman at said hospital. His condition was diagnosed as suffering from arteriosclerotic heart disease with angina pectoris class II-B.

The affidavit of Edward Braverman, M.D. states, in substance, that he examined the applicant who was under his care for this heart disorder. A copy of the discharge summary of Doctor's Hospital of the applicant is attached to the affidavit of Dr. Braverman.

In opposition to this motion, the affidavit of Irene Solomon, widow of the decedent, Herbert Solomon, alleges that Irving R. Aaronson, an agent of the insurer was

Order dated March 31, 1975 granting plaintiff's motion.

fully aware of the decedent's physical condition, and that he told the decedent, "Forget it" or "Don't worry about it." Also, they believed that the agent had full authority as an agent to bind the insurer.

The affidavit of John F. Morrison, Esq. alleges that the insurer had sufficient notice concerning the physical condition of the decedent, and, therefore is estopped from rescinding the policy.

The questions presented are two-fold, namely, whether pursuant to applicable law, Herbert Solomon's misrepresentations avoid the plaintiff's liability on the policy, and, secondly, whether the plaintiff had notice of the misrepresentations, such that constituted a waiver and estopped from rescinding the policy.

In *Fleet Messenger Service v. Life Insurance Co. of North America*, 315 F.2d 593 (Cir. 2), the Court held in part at page 597:

"Under New York Insurance Law, McKinney's Consol. Laws, c. 28, § 149(2) a material misrepresentation avoids an insurance contract.³ Section 149(4) provides that, for purposes of determining materiality, a misrepresentation that an applicant for life insurance 'has not had previous medical treatment, consultation or observation' shall be deemed a misrepresentation that the applicant 'has not had the disease, ailment or other medical impairment for which such treatment or care was given or which was discovered by any licensed medical practitioner as a result of such consultation or observation'.⁴ There is no dispute that, if by § 149(4) the insured is deemed to have had the disease for which he was treated, that fact is material under the standard of materiality contained in § 149 (2).⁵ Chase's misrepresentations are unquestionably

Order dated March 31, 1975 granting plaintiff's motion.

covered by § 149(4); unless waived, therefore, they constitute a defense in an action to recover on the policy."

There is no question that the ailment of the decedent, Herbert Solomon, was of such a serious nature as to be material as a matter of law. Fleet Messenger Service, *supra*.

Therefore, the sole question to be determined is whether the insurer had such notice of the misrepresentations before it issued the policy that it should be held to have waived the defense.

The defendants urge that the agent of the insurer, Irving I. Aaronson, was informed of the true medical history of the decedent, who informed the applicant to "Forget it" or "Don't worry about it." Since the agent was representing the insurer, any statements by him bound the company. Whether or not said statements were made by the agent is of little consequence and could not bind the insurer. The application for insurance contained Part A which was attached to said policy. Immediately above the signature of the proposed insured, Herbert Solomon, Part A contained several conditions among which was 2:

"The agent taking this application has no authority to make, modify, alter or discharge any contract hereby applied for, nor to extend credit on behalf of the Company. No statement made to or information acquired by any representative of the Company shall bind the Company unless set out in writing in Parts A or B of this application."

Furthermore, it is urged that the insurer knew that Dr. Friedman was the applicant's personal physician, and under his care. A simple request of the office copy of

Order dated March 31, 1975 granting plaintiff's motion.

Dr. Friedman's report would have disclosed the complete medical history of Mr. Solomon. The medical form was returned to the insurer during April 1973 which indicated that the applicant underwent an electrocardiogram test. This was prior to making application for the policy. At the time the insurer became aware of Dr. Friedman's existence, Mr. Solomon was asked to sign a Request for Amendment of Application to reflect visits to the physician. The response of the applicant was that he visited Dr. Friedman during the past five years for "check-ups and minor complaints" from 1961 to 1972 and all results were normal. However, a copy of Dr. Friedman's medical record of Herbert Solomon attached in opposition to this motion clearly indicates that the applicant was under his care from October 31, 1957 up to and including May 8, 1972 for various complaints including chest pains with electrocardiogram tests taken of Mr. Solomon. His record further discloses that on November 29, 1972, approximately seven months prior to the issuance of the policy, the applicant was admitted to Doctor's Hospital on November 29, 1972 and discharged December 3, 1972 with the diagnosis, arteriosclerotic heart disease with angina pectoris, class II-B. The hospital record is attached to the affidavit of Dr. Braverman, the attending physician indicating said history.

It is clear from the above that Mr. Solomon misrepresented his physical condition and history when he applied for insurance. It may be argued that the insurer was negligent in not making inquiry to the fullest extent of Dr. Friedman. However, this does not constitute notice. In Cherkes v. Postal Life Insurance Company, 285 App. Div. 514, 138 N.Y.S. 2d 788, affirmed without opinion, 309 N.Y. 964, the Court held in part at page 790:

"Defendant's negligence in not making further inquiry may be conceded, but that is not the equivalent of

Order dated March 31, 1975 granting plaintiff's motion.

knowledge, nor does it cancel out or counteract the insured's fraud. Knowledge that the insured was not a favorable risk did not cast the burden upon defendant of looking suspiciously and searchingly beyond the facts for undisclosed ailments * * *. The test is not one of what prudent inquiry would have revealed. The question is whether the information given, although partial, was sufficiently indicative of something more to be tantamount to notice of the unrevealed."

See also *Zelzman v. Mutual Life Insurance Co.*, 269 App. Div. 53, 53 N.Y.S. 2d 792.

The authorities cited by the defendants do not disagree with these cases, they are simply distinguishable upon their peculiar facts.

The facts presented in this motion are overwhelming that the applicant, Herbert Solomon, did not advise the insurer of his true medical history upon which the plaintiff was entitled to rely in deciding whether or not to issue a policy of life insurance.

The motion of the plaintiff, National Life Insurance Company, rescinding the policy is granted.

Settle order on five (5) days' notice.

Copies hereof are being forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U. S. D. J.

Notice of Motion of the Settlement Order dated April 15, 1975
 Granting Plaintiff's Motion.

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NEW YORK

- - - - - x

NATIONAL LIFE INSURANCE COMPANY, :
 Plaintiff, : 74 Civ. No. 1450

v. :
 NOTICE OF SETTLEMENT
 IRENE SOLOMON and LOUIS SCHUSTER
 as Trustee of the S&L Pension
 Trust-R.T.B. Industries, Inc. :
 Defendants. :

 - - - - - x

SIRS:

PLEASE TAKE NOTICE that the attached order will
 be presented for settlement at the office of the Clerk of
 the United States District Court for the Eastern District
 of New York at 225 Cadman Plaza East, Brooklyn, New York,
 on the 15th of April, 1975 at 10:00 o'clock in the forenoon.

LeBOEUF, LAMB, LEIBY & MacRAE

Dated: New York, N.Y.
 April 14, 1975

By Taylor R. Briggs
 Taylor R. Briggs

Attorneys for Plaintiff
 Office and P.O. Address
 140 Broadway
 New York, New York 10005
 (212) 269-1100

TO: ALLAN BAKST, ESQ.
 Attorney for Defendants
 21 East 40th Street
 New York, New York 10016

RIVKIN, LEPP & SHERMAN
 Attorneys for Defendants
 55 North Ocean Avenue
 P.O. Box 669
 Freeport, New York 11520

Proposed Order Annexed to Foregoing Motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

NATIONAL LIFE INSURANCE COMPANY, :
Plaintiff, : 74 Civ. No. 1450

v. :
IRENE SOLOMON and LOUIS SCHUSTER : ORDER GRANTING
as Trustee of the S&L Pension : MOTION FOR SUMMARY
Trust-R.T.B. Industries, Inc. : JUDGMENT

Defendants. :
----- x

A motion having been regularly made by the plaintiff herein for summary judgment in the plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

Now, on considering the pleadings, affidavits and memoranda submitted herein; and after hearing counsel for the respective parties, and due deliberation having been had, and the decision of the court having been filed, it is

ORDERED, that said motion be and the same hereby is granted, and that judgment be entered herein in favor of the plaintiff rescinding a policy of life insurance issued by the plaintiff on the life of Herbert Solomon in the face amount of \$240,792, and bearing plaintiff's policy No. 1462937; and it is

FURTHER ORDERED that the defendants surrender and deliver said insurance policy to the plaintiff for cancellation; and it is

Proposed Order Annexed to Foregoing Motion.

FURTHER ORDERED that the defendants and each of them, as well as their executors, administrators or assigns, be and they are hereby perpetually restrained from commencing or prosecuting any action or proceeding on account of, or under, or by virtue of the terms of said insurance policy and that any such action, or proceedings as may have been commenced by said defendant or any of them is hereby perpetually stayed; and it is

FURTHER ORDERED that costs and disbursements of this action be taxed by the clerk in favor of the plaintiff and against the defendants.

Dated: Brooklyn, New York
April , 1975

Senior United States District Judge

Judgment dated April 16, 1975 Granting Plaintiff's Motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

* * APR 18 1975 *

NATIONAL LIFE INSURANCE COMPANY,

Plaintiff,

v.

JUDGMENT

IRENE SOLOMON and LOUIS SCHUSTER
as Trustee of the S&L Pension
Trust-R.T.B. Industries, Inc.,

74 C 1450

Defendants.

An order signed by the Honorable Walter Bruchhausen, United States District Judge, having been filed on April 16, 1975, granting the motion for summary judgment and directing that judgment be entered in favor of the plaintiff, rescinding a policy of life insurance issued by the plaintiff on the life of Herbert Solomon in the face amount of \$240,792, and bearing plaintiff's policy No. 1462937; and that the defendants surrender and deliver said insurance policy to the plaintiff for cancellation; and that the defendants and each of them, as well as their executors, administrators or assigns, be and they are hereby perpetually restrained from commencing or prosecuting any action or proceeding on account of, or under, or by virtue of the terms of said insurance policy and that any such action, or proceedings as may have been commenced by said defendant or any of them is hereby perpetually stayed; and that the costs and disbursements of this action be taxed by the Clerk in favor of the plaintiff and against the defendants, it is

Judgment.

ORDERED and ADJUDGED that the plaintiff's motion for summary judgment is granted and that the life insurance policy issued by the plaintiff on the life of Herbert Solomon in the face amount of \$240,792 and bearing plaintiff's policy No. 1462937 is rescinded, and it is further

ORDERED and ADJUDGED that the defendant surrender said insurance policy to the plaintiff for cancellation, and it is further

ORDERED and ADJUDGED that the defendants and each of them, as well as their executors, administrators or assigns, be and they are hereby perpetually restrained from commencing or prosecuting any action or proceeding on account of, or under, or by virtue of the terms of said insurance policy and that any such action, or proceedings as may have been commenced by said defendant or any of them is hereby perpetually stayed and, it is further

Judgment.

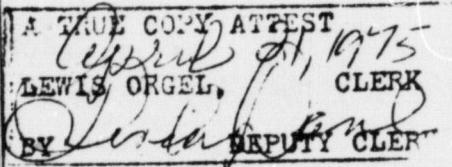
ORDERED and ADJUDGED that costs and disbursements of this action be taxed by the clerk in favor of the plaintiff and against the defendants.

Dated: Brooklyn, New York
April 16, 1975

Lewis Orgel
Clerk

Approved: cyu L 17.1975

Walter Bruckman
U. S. D. J.



Notice of Appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

NATIONAL LIFE INSURANCE COMPANY,

74 Civ. No. 1450

Plaintiff,

v.

NOTICE OF APPEAL .

IRENE SOLOMON and LOUIS SCHUSTER
as Trustee of the S & L Pension Trust-
R.T.B. Industries, Inc.

Defendants.

----- X

S I R S :

NOTICE is hereby given that Irene Solomon and Louis Schuster, as Trustee of the S & L Pension Trust - R.T.B. Industries, Inc., the defendants, above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 21st day of April, 1975.

Dated: May 2, 1975.

RIVKIN, LEFF & SHERMAN

By _____

Attorneys for Defendants
Office & P. O. Address
55 North Ocean Avenue
Freeport, New York

TO:

Notice of Appeal.

LeBOEUF, LAMB, LEIBY & MacRAE, ESQS.
Attorneys for Plaintiff
Office & P. O. Address
140 Broadway
Borough of Manhattan
City of New York

ALLAN BAKST, ESQ.
21 East 40th Street
New York, New York 10016

Bill of Costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

NATIONAL LIFE INSURANCE COMPANY, :
Plaintiff, :
v. : 74 Civ. 1450

IRENE SOLOMON and LOUIS SCHUSTER, :
as Trustee of the S&L Pension Trust-
R.T.B. Industries, Inc., :
Defendants. :
----- X

TO: Messrs. Rivkin, Leff & Sherman
55 North Ocean Avenue
Freeport, New York 11520

Allan Bakst, Esq.
21 East 40th Street
New York, New York 10016

PLEASE TAKE NOTICE that the attached bill of costs
in the above entitled action will be presented for taxation to
the Clerk of the United States District Court for the Eastern
District of New York at his office in the Emanuel Celler Federal
Building at 225 Cadman Plaza East, Brooklyn, New York, on Monday,
May 19, 1975, at ten o'clock a.m.

Dated: New York, New York
May 12, 1975

18 Charles P. Sifton

Charles P. Sifton
Attorney for Plaintiff
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005
(212) 269-1100

Bill of Costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL LIFE INSURANCE COMPANY, :

Plaintiff, :

v. :

Index # 74C1450

IRENE SOLOMON and LOUIS SCHUSTER, :
as Trustee of the S&L Pension Trust- :
R.T.B. Industries, Inc., :

Defendants. :

Judgment having been entered in the above entitled
action on the 21st day of April, 1975, against Irene Solomon and
Louis Schuster as Trustee of the S&L Pension Trust-R.T.B. Indus-
tries, Inc., the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	\$ 15.00
Fees of the Marshall	8.92
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	
Fees and disbursements for printing	
Fees for witnesses	
Fees for exemplification and copies of papers necessarily obtained for use in the case	4.00
Docket Fees under 28 U.S.C. 1923	20.00
Costs incident to taking of depositions	
Costs as shown on Mandate of Court of Appeals	
Other costs	
TOTAL	\$ 47.92

Bill of Costs.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

I, Charles P. Sifton, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually performed.

1st Charles P Sifton
Charles P. Sifton
Attorney for Plaintiff
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005
(212) 269-1100

Subscribed and sworn to before
me this 12th day of May, 1975.

Richard D Baxter
Notary Public
RICHARD D. BAXTER
Notary Public of New York
No. 33-35
Qualified in Nassau County
Commission Expires March 30, 1976

Costs are hereby taxed in the amount of \$ this day of
, 1975, and that amount included in the judgment.

Clerk.

By

Deputy Clerk